

PUBLIC VERSION



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FOUNDED 1866

July 20, 2017

By ECFS

Marlene H. Dortch  
Office of the Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: ***AT&T Corp. v. Iowa Network Services, Inc.***, Proceeding Number No. 17-56;  
**File No. EB-17-MD-001**

Dear Ms. Dortch:

AT&T Corp. (“AT&T”), on behalf of itself and Iowa Network Services, Inc. d/b/a Aureon Network Services (“Aureon”) (together with AT&T, the “Parties”), submits for filing the **Public Version** of the Parties’ Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, as well as the Parties’ Joint Statement on Settlement, Discovery and Scheduling in the above-referenced matter.<sup>1</sup> Consistent with the Commission’s rules and the February 24, 2017, Protective Order entered by the Commission Staff, the Parties have redacted all confidential, highly confidential, and third party highly confidential information from the **Public Version**, which AT&T is filing by ECFS.

AT&T is filing by hand with the Secretary’s office hard copies of the **Third Party Highly Confidential, Highly Confidential and Confidential Versions** of the submission. Three courtesy hard copies of the **Highly Confidential Version** are also being provided to the Commission’s Enforcement Bureau.

Please contact me if you have any questions regarding this matter.

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<sup>1</sup> Counsel for Aureon has reviewed this letter and represented to counsel for AT&T that it is acceptable to Aureon.



Marlene H. Dortch  
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Sincerely,

A handwritten signature in blue ink, reading "James F. Bendoragel, Jr.", written over a horizontal line.

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James F. Bendoragel, Jr.  
*Counsel for Complainant AT&T Corp.*

Enclosures

cc: James L. Troup, Counsel for Defendant  
Tony Lee, Counsel for Defendant  
Lisa Griffin, FCC  
Anthony DeLaurentis, FCC  
Christopher Killion, FCC

**PUBLIC VERSION**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

**In the Matter of**

**AT&T CORP.  
One AT&T Way  
Bedminster, NJ 07921  
202-457-3090**

*Complainant,*

**Proceeding Number 17-56  
File No. EB-17-MD-001**

v.

**IOWA NETWORK SERVICES, INC.  
d/b/a Aureon Network Services  
7760 Office Plaza Drive South  
West Des Moines, IA 50266  
(515) 830-0110**

*Defendant.*

**JOINT STATEMENT OF STIPULATED FACTS,  
DISPUTED FACTS, AND KEY LEGAL ISSUES**

AT&T Corp. (“AT&T”) and Iowa Network Services, Inc. d/b/a Aureon Network Services (“Aureon”) (collectively, the “Parties”), in accordance with the Federal Communication Commission’s (the “Commission”) June 13, 2017 Notice of Formal Complaint (the “Notice”) and Sections 1.732(g), 1.733(b)(1)(v), 1.733(b)(2) of the Commission’s rules, 47 C.F.R. §§ 1.732(g), 1.733(b)(1)(v), and 1.733(b)(2), respectfully submit the following Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues. Separately, the Parties provide their Joint Statement on Discovery and Scheduling in accordance with the Notice and Section 1.733(b)(1)(i)-(iv) of the Commission’s rules, 47 C.F.R. §§ 1.733(b)(1)(i)-(iv).

The Parties have defined stipulated facts to be facts upon which both Parties agree and disputed facts to be facts upon which both Parties do not agree, but the inclusion of any fact as a

stipulated fact or disputed fact does not constitute an admission by either of the Parties that the fact is relevant or material to the legal issues in dispute. Moreover, the stipulated facts and disputed facts listed below are not meant to address comprehensively every fact that has been raised by the Parties in this case, but rather are meant to identify central facts upon which the Parties agree or disagree. Where the Parties agree, the stipulated facts are presented as organized below within fact clusters that one or both Parties claim are relevant to key issues in this case. The absence of a particular fact in the lists below should thus not be construed as an admission that any such fact is irrelevant or insignificant. Neither of the Parties waives the right to rely on or assert a fact that is not included in this stipulation. The Parties stipulate to these facts for purposes of this proceeding only.

**I. STIPULATED FACTS**

**A. The Parties**

1. AT&T is a New York corporation that provides communications and other services, and has its principal place of business in Bedminster, New Jersey.
2. In general, AT&T is a long distance telephone company that provides telecommunications services enabling customers from one local exchange area to call customers in other local exchange areas.
3. In general, AT&T offers its long distance telephone service to the public for a fee, collects revenue from the customers that place calls, and in some circumstances pays a charge to connecting carriers, such as Aureon, for the use of Aureon's facilities.
4. AT&T provides wholesale services to other telecommunications carriers.
5. AT&T is a customer of Aureon, and uses Aureon's network to complete certain calls for AT&T's customers.
6. Aureon is an Iowa corporation that provides centralized equal access ("CEA") services through its Access Division, and other services through its other divisions, and has its principal place of business in West Des Moines, Iowa.
7. Aureon was founded in 1988 by a group of small, rural incumbent local exchange carriers ("ILECs") (also referenced as Independent Telephone Companies or "ITCs") for the purpose of providing CEA service.

8. Aureon provides CEA service in Iowa and Nebraska.
9. In its tariff filings, Aureon has stated that it has made substantial investments in its network, including its fiber network.
10. Aureon, through its IXC Division,<sup>1</sup> has offered other network services over its fiber network, including various backhaul services for wireless carriers, as well as the leasing of DS-3 fiber capacity to ILECs and other carriers.
11. Aureon's business now includes a variety of advanced and modern services provided through its IXC and other divisions, including: (a) voice services (VoIP, IP Fax, hosted PBX); (b) dedicated Internet access; (c) cloud and data storage; (d) IT support (technology planning, help desk, disaster recovery, IT security); (e) human resources (administrative services, staffing, leadership development, senior living services); and (f) call centers.

**B. Procedural History**

12. On May 30, 2014, Aureon filed a complaint against AT&T in the United States District Court for New Jersey stating that: (1) AT&T breached Aureon's federal tariff; and (2) AT&T breached Aureon's state tariffs. Aureon further requested both: (1) the award of direct and consequential damages for AT&T's conduct, interest and attorneys' fees; and (2) the issuance of a permanent injunction barring AT&T from continuing its misconduct.
13. On July 6, 2015, AT&T filed a letter with the District Court raising the issue of the primary jurisdiction doctrine.
14. In an Order dated October 14, 2015, the District Court issued an order staying the case and referring it to the FCC pursuant to the doctrine of primary jurisdiction. AT&T Ex. 5, Mem. Order, *Iowa Network Servs., Inc. v. AT&T Corp.*, No. 14-cv-03439 (PGS), 2015 WL 5996301, at \*7–8 (D.N.J. Oct. 14, 2015) (“*Referral Order*”), *reh’g denied, request for interlocutory appeal denied*, (D.N.J. Dec. 7, 2015).
15. On October 28, 2015, Aureon filed a motion requesting, inter alia, that the District Court reconsider its October 14, 2015 order.
16. On December 8, 2015, the District Court issued an order denying Aureon's motion for reconsideration of the District Court's October 14, 2015 order.
17. In a September 27, 2016 Letter Ruling, the Commission ordered AT&T to file a Formal Complaint addressing all issues referred by the District Court.

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<sup>1</sup> Aureon's IXC Division is referred to interchangeably as the “IXC Division” or the “Network Division.” The Parties have attempted to maintain consistency in this filing by only referring to the IXC Division.

**C. CEA Service**

18. In the 1980s, many switches of small, rural ILECs did not have the capability of providing service to more than one long distance carrier on a 1+ basis, and many such ILECs claimed they lacked the financial wherewithal to upgrade or to replace their existing switches.

19. In a number of states with numerous small, rural ILECs, it was asserted that new IXC's would not be willing to incur the costs to construct the facilities needed to interconnect their long distance networks directly to the end office switches of many rural ILECs; the cost of constructing such facilities was believed to be high, and the volume of potential traffic from each individual rural ILEC was very small.

20. In some states, groups of small, rural ILECs sought to address the above described issues by forming entities – CEA providers – to provide CEA service.

21. CEA service enables IXC's to complete their customers' long distance telephone calls, without building their own networks, by connecting the IXC's facilities to the local exchange carrier ("LEC") networks.

**D. CEA Service in Iowa**

22. On February 29, 1988, the Commission granted Section 214 authorization to Aureon to build a fiber optic network to provide CEA service. *See In re Application of Iowa Network Access Div.*, 3 FCC Rcd. 1468 (1988) ("*FCC 214 Order*"), *aff'd on recon.*, 4 FCC Rcd. 2201 (1989) ("*FCC 214 Recon. Order*"). The Commission authorized CEA service for both originating and terminating traffic.

23. Aureon received state approval for its intrastate CEA service that same year. *In re Iowa Network Access Div., Div. of Iowa Network Servs.*, RPU-88-2, 1988 Iowa PUC LEXIS 1 (Iowa Utilities Board Oct. 18, 1988) ("*State Authorization*"), *aff'd on appeal*, *Nw. Bell Tel. Co. v. Iowa Utils. Bd.*, 477 N.W.2d 678, 681 (Iowa 1991). *See also* Aureon Ex. 29, *Iowa Network Access Division*, Order Granting Rehearing for the Limited Purpose of Modification and Clarification and Denying Intervention, Docket No. RPU-88-2 (IUB Dec. 7, 1988) ("*IUB Rehearing Order*").

24. Aureon's Access Division provides CEA service and, as to that service, is classified as a dominant carrier. INS has filed its tariffed rates for CEA service pursuant to Section 61.38.

25. Aureon's CEA service is provided to IXC's and, among other things, enables IXC's to deliver long distance traffic to the approximately 200 LEC's that subtend Aureon's network.

26. Aureon's CEA service does not provide any service to end users,

27. Some CLEC's and ILEC's operating in Iowa do not subtend Aureon's network, and Aureon does not route traffic to every CLEC and ILEC that operates in Iowa.

28. For example, Level 3 Communications, LLC, which does not have a traffic agreement with Aureon, does not subtend Aureon's network, and AT&T sends calls to Level 3's Iowa customers through a tandem provider other than Aureon.
29. Pursuant to routing guidelines provided by LECs, AT&T has sent traffic to Aureon's network for routing to LECs connected to Aureon's network.
30. AT&T has not blocked any traffic to Aureon's network or to LECs connected to Aureon's network.
31. Aureon has routed traffic sent by AT&T to LECs connected to Aureon's network.

**E. Aureon's Tariffs**

32. Aureon has filed CEA tariffs with the FCC, Nebraska Public Service Commission, and the Iowa Utilities Board.
33. The rates and terms governing CEA service are set forth in Aureon's tariffs.
34. The Aureon tariff at issue in this proceeding (INAD Tariff F.C.C. No. 1) is titled "Centralized Equal Access Service" and it sets forth the "Regulations, Rates and Charges applying to the Provision of Centralized Equal Access Service within the certificated operating territory of Iowa Network Access Division in the State of Iowa." It was first filed on August 10, 1988.
35. The phrase "Centralized Equal Access Service" is capitalized throughout Aureon's tariff, but the tariff does not include a definition for that term.
36. INAD Tariff F.C.C. No. 1 states that "Switched Access Service, when combined with the services offered by Exchange Telephone Companies, is available to Customers. Iowa Network provides a two-point electrical communications path between a point of interconnection with the transmission facilities of an Exchange Telephone Company at a location listed in Section 8 following and Iowa Network's central access tandem where the Customer's traffic is switched to originate or terminate its communications. It also provides for the switching facilities at Iowa Network's central access tandem." *See* Aureon Ex. 47, INAD Tariff F.C.C. No. 1, § 6.1, 4th Revised Page 88.
37. Aureon's interstate CEA service is provided pursuant to a single tariff rate that is referred to as the switched transport rate. That single switched transport rate is a non-distance sensitive rate that recovers the costs of both transport and tandem switching.
38. In April 2017, Aureon submitted a tariff filing to add a high-volume contract tariff service. This high-volume service, which is described in Aureon's initially proposed High-Volume Traffic Contract No. 1, was to be offered at a lower rate (\$0.00649 per minute), and a prerequisite to receiving the service was that the customer must sign a separate contract with Aureon and must agree not to challenge any of Aureon's rates.

39. The initially proposed High-Volume Traffic Contract No. 1 also stated that the high-volume service would be “provided subject to additional terms and conditions that are not applicable to centralized equal access service. Therefore, by ordering service under High-Volume Traffic Contract Tariff No. 1, Customer agrees to provisioning flexibility for Iowa Network and other terms that will result in the Customer receiving a switching and Transport service that is not like the centralized equal access service that is not subject to those additional terms and conditions.” See AT&T Ex. 46, Aureon April 2017 Revised Tariff Filing, § 7.1.1 (filed Apr. 14, 2017) (emphasis original).

40. Aureon delayed the effective date of its April 2017 proposed tariff filing until the Commission could further review Aureon’s proposal.

41. In May 2017, Aureon filed an application for special permission to withdraw its proposed contract tariff service, and to substitute a new “volume discount” plan that has the same rate (\$0.00649 per minute) as the proposed contract service and also requires execution of a separate service agreement.

42. “The volume discount plan establishes a switched transport rate of \$0.00649 per access minute per month for Customers with a minimum monthly usage volume of at least 25 million interstate interlata terminating minutes-of-use and 80% or greater utilization of each trunk group. The switched transport rate specified in section 6.8.1.(A) will apply to all access minutes less than the minimum usage volume specified above. The Customer’s request for this discount plan will commence upon a signed service agreement between Iowa Network and the Customer.” See Aureon Ex. 47, INAD Tariff F.C.C. No. 1, § 6.7.3, 2nd Revised Page 137 (effective May 20, 2017).

43. Aureon has not negotiated an agreement with AT&T with regard to access services.

#### **F. Access Stimulation Traffic**

44. Access rates are generally higher in rural areas.

45. Access stimulation schemes have occurred in states, like Iowa, that have a large number of rural LECs that charge higher rates for access service than in non-rural areas.

46. To take advantage of those higher rates, competitive LECs (“CLECs”) engaged in access stimulation have historically located their operations in jurisdictions where they could benchmark their rates to the higher rates of rural ILECs.

47. Typically, these CLECs engaged in access stimulation would not compete with those ILECs for local telecommunications business; instead, they would partner with chat and conferencing companies, also known as “free calling parties” or “FCPs,” to drive traffic to the FCPs’ chat and conferencing equipment, thereby generating high access revenues that were then shared with the FCPs.

48. Suspected conference terminating traffic identified by Aureon’s engineering department based on traffic spikes and utilizing specific trunks accounted for [[BEGIN



**HIGHLY CONFIDENTIAL]]** [REDACTED]

**CONFIDENTIAL]]** See AT&T Ex. 2, INS Worksheet (Aureon\_02696–02708), at Aureon\_02697–98.

49. Aureon’s traffic agreements with ILECs and CLECs are nearly identical, and require the LECs to route all of their traffic through the CEA network. **[[BEGIN CONFIDENTIAL]]** [REDACTED]

**[[END CONFIDENTIAL]]**

50. In its April 2017 Revised Tariff Filing, Aureon defined “High-Volume Traffic” as terminating traffic routed to one of eight designated OCNs: Reasnor Telco, LLC (OCN 739d); BTC, Inc.-IA (OCN 156c); Great Lakes Com-IA (OCN 345d); Omnitel Comm-IA (OCN 3620); Goldfield Access Network (OCN 7094); Interstate Cablevision Company (OCN 860E); Premier Comm-IA (OCN 904D); and Louisa Communication (OCN 4560). See AT&T Ex. 46, INS April 2017 Revised Tariff Filing, Revised Tariff Page 146 (§7.1); AT&T Ex. 80, AT&T Billing Summary, at 13–20.

51. High volumes of traffic is currently routed to each of these entities.

52. Substantially all access stimulation traffic is terminating, not originating traffic.

53. Nearly all access stimulation traffic consists of terminating interstate calls, not intrastate calls.

54. **[[BEGIN 3P HIGHLY CONFIDENTIAL]]** [REDACTED]

**[[END 3P HIGHLY CONFIDENTIAL]]**

55. **[[BEGIN 3P HIGHLY CONFIDENTIAL]]** [REDACTED]

**CONFIDENTIAL]]** **[[END 3P HIGHLY**

**G. Aureon’s Rates for CEA Service**

56. As initially filed in 1988, the rate that Aureon proposed to charge for CEA service was \$0.0161 per minute. Aureon revised its tariff filing and lowered its rate to \$0.0117 per minute in 1989.

57. In 2003, Aureon’s CEA rate was \$0.01045 per minute.

58. In 2007, Aureon’s CEA rate was reduced to \$0.00855 per minute.

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59. On December 29, 2011, when the Commission's rate cap went into effect, Aureon's interstate CEA rate was \$0.00819 per minute.
60. In June 2012, Aureon filed a revised tariff that reduced its interstate CEA rate to \$0.00623 per minute.
61. In June 2013, Aureon filed another revised tariff that increased its CEA rate to its current level of \$0.00896 per minute.
62. The June 17, 2013 FCC tariff rate revision was electronically filed with the FCC and was publicly available on June 17, 2013.
63. The tariff pages filed with the FCC state that the effective date of Aureon's tariff is July 2, 2013.
64. Between the June 17, 2013 tariff filing date and the July 2, 2013 tariff effective date, AT&T did not file at the FCC a petition pursuant to 47 C.F.R. § 1.773 to suspend Aureon's CEA tariff.
65. Between the June 17, 2013 tariff filing date and the July 2, 2013 tariff effective date, the FCC did not suspend the FCC tariff rate revision or take any other action regarding that tariff filing.
66. Aureon's present tariffed rate for interstate CEA service is \$0.00896 per minute and is non-distance sensitive.
67. AT&T has not filed at the FCC a petition pursuant to 47 C.F.R. § 1.773 to suspend Aureon's CEA tariff.
68. The current rate in the CEA tariff has not been suspended or rejected by the FCC in response to a petition pursuant to 47 C.F.R. § 1.773.
69. Aureon's intrastate rate is \$0.0114 per minute for CEA switching services plus \$0.0003 per minute, per mile for transport, and it has been at that level since the early 1990s.
70. Following adoption of the Commission's rate parity rules pursuant to the *Connect America Order*, Aureon did not bring its intrastate CEA rates in line with its interstate rates.
71. Since 2008, Aureon's ratio of terminating minutes to originating minutes has exceeded 3:1 in every single year.
72. Aureon is not a "Price Cap Carrier" because Aureon is not a LEC subject to price cap regulation pursuant to 47 C.F.R. §§ 61.41 through 61.49. Therefore, the tariff price reductions for "Price Cap Carriers" described in 47 C.F.R. § 51.907 are inapplicable to CEA service.

**H. The History of this Dispute**

73. AT&T submitted access service requests for CEA service to Aureon.
74. Aureon confirmed receipt of the ASRs and provided the facilities that AT&T ordered.
75. Aureon has sent monthly invoices to AT&T for access service. AT&T fully paid Aureon's August 2013 invoice and previous invoices for access service.
76. In October 2013, AT&T disputed Aureon's billed access service charges and began withholding payment on access charges it claims were being improperly billed by Aureon.
77. AT&T has not fully paid Aureon's September 2013 invoice and subsequent invoices.
78. Since January 2013, Aureon has billed AT&T at its tariffed CEA rates for over 4 billion minutes of use ("MOUs") of traffic bound for Great Lakes and other CLECs.

**I. Aureon's Rate Calculation**

79. As a dominant carrier, Aureon is required to calculate its CEA rate and provide supporting cost and traffic data in accordance with Section 61.38.
80. Aureon's initially approved CEA rate in 1989 was \$0.0117 per minute; its current rate is \$0.00896 per minute.
81. Between 1989 and 2017, the CEA rate – non-distance sensitive rate – declined approximately 23.4%, or less than three tenths of a cent.
82. During the period from 1989 to 2010, the national average traffic sensitive interstate switched access charge per minute went from \$0.030 (April 1989) to \$0.0064 (2010)—a decline of about 79%.
83. Decreases in Aureon's rates for services other than CEA provided by Aureon's IXC Division and other divisions have been greater than the decline in its rate for CEA service provided by the Access Division.
84. In its tariff filings, Aureon has indicated that none of the investments in Aureon's network were recorded on the books of the Access Division. Instead, 100% of the investment was recorded on the books of the IXC Division.
85. The fiber network is owned by the IXC Division, which leases capacity on Aureon's network to the Access Division for use in providing CEA service.

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86. Account 6410 (Cable & Wire Facilities Expenses) includes the lease costs that Aureon's Access Division incurs for the amount of facilities it leases from the IXC Division.
87. Lease costs are directly assigned to the division to which the lease rate is charged.
88. All non-lease expenses in Account 6410 are assigned to undistributed costs and allocated on the basis of Cable and Wire Facilities ("CWF") investment in Account 2410.
89. The Access Division's allocated share of the costs of "Cable and Wire Facilities" went from about 48 percent during the 2004-2008 period to above 70 percent during the 2013-2016 period.
90. Between 2004 and 2016, the amounts for Cable and Wire Facilities allocated to Aureon's other divisions declined from about \$14 million in 2004 to about \$5 million in 2016.
91. The percentage of the Access Division's costs allocated to interstate long distance calls has increased from about 40 percent in 2004 to in excess of 90 percent in 2017.
92. In its 2008 tariff review plan filing, the Access Division made adjustments to its percentage of interstate use factor due to more accurate classification of call traffic jurisdiction as a result of equipment upgrades; this change resulted in the PIU factor for calls associated with call aggregation increasing from 48 percent to 78 percent.
93. In its 2010 tariff filing, Aureon stated that in 2007, it "began to experience an increase in uncollectible revenues from an [IXC] as a result of billing disputes over the classification and quantification of interstate access minutes related to traffic terminated by the IXC to ILEC customer locations in Iowa."
94. Aureon included \$2,893,575 in "Uncollectible Revenues" as an expense in connection with its 2010 tariff filing,
95. Going forward, Aureon included additional amounts of "Uncollectible Revenues" as an expense in future filings, such that, during the period from 2010 to 2016, Aureon included in its revenue requirement calculations a total of almost \$30 million in "Uncollectible Revenues."
96. **[[BEGIN HIGHLY CONFIDENTIAL]]** [REDACTED] **[[END HIGHLY CONFIDENTIAL]]**
97. The cost supported rate of \$0.01332 in Aureon's 2016 tariff filing is at that level due to the inclusion of \$16.5 million of uncollectible expense in the study. Were it not for this uncollectible amount, the calculated support rate would have decreased 26% from the rate in 2014, and 58% from the rate in 1989, and would be \$0.00673 – a full half cent less than in 1989, and at least \$0.002 less than its current rate.

## II. AUREON'S DISPUTED FACTS

### A. CEA Service

1. On February 29, 1988, the Commission granted Section 214 authorization to Aureon to build a fiber optic network to provide CEA service, and other advanced features and modern information services. When the CEA network was initially proposed, AT&T did not need the CEA network, and would incur additional costs to route AT&T's traffic over the CEA network, because AT&T was already connected to all the LEC end offices in Iowa by the transport facilities provided by Northwestern Bell. Finding that the CEA network would not be economically viable if it carried only the traffic of new market entrants, the Commission required AT&T to route its terminating traffic over the CEA network to the LECs' end offices connected to the CEA network.
2. Aureon's CEA network makes it economical for AT&T's smaller competitors to provide service to rural Iowa by aggregating traffic for hundreds of rural LECs at Aureon's tandem switch in Des Moines, and centralizing the provisioning of expensive features and advanced functionalities.
3. CEA Services was developed to solve the problem of how to achieve competition with AT&T in small rural areas for both terminating calls and originating calls. CEA service for terminating traffic has made it economical for AT&T's smaller competitors to provide service to rural Iowa. Rather than incurring the substantial cost of constructing transport facilities to each rural Iowa local exchange, smaller carriers and new market entrants are able to connect with the CEA network at a single location in order to terminate their customers' calls to all the exchanges of more than 200 rural local LECs listed in the CEA tariff.
4. The Commission and the Iowa Utilities Board ("IUB") authorized CEA service to make advanced features and modern information services available in rural Iowa. The FCC authorized construction of the CEA network to "speed the availability of high quality varied competitive services to small towns and rural areas." *FCC 214 Order*, 3 FCC Rcd. at 1468, ¶ 4, and 1474, ¶ 38. The Iowa Utilities Board approved Aureon's CEA network because "the concentration will benefit the general public in Iowa by assuring that a substantial portion of rural Iowa will have a network in place to deliver information services."<sup>2</sup> In affirming approval of the CEA network, the courts recognized that the provision of modern information services was an important objective of CEA service. *Nw. Bell Tel. Co.*, 477 N.W.2d at 681 ("the network will also offer 'modern information systems'").
5. Although the FCC has authorized other carriers to provide CEA service, *see In re Application of Ind. Switch Access Div.*, File No. W-P-C-5671, 1986 WL 291436 (FCC Apr. 10, 1986), *on review* 1 FCC Rcd. 634 (1986); *In re the Application of SDCEA, Inc.*, 5 FCC Rcd. 6978 (1990); AT&T Ex. 12, Memorandum Opinion, Order and Certificate, *In re Application of Minn. Indep. Equal Access Corp.*, File No. W-P-C-6400, (F.C.C. rel.

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<sup>2</sup> *State Authorization*, slip op. at 10.

Aug. 22, 1990), the CEA networks in Indiana, South Dakota, and Minnesota, did not involve the extensive construction of new fiber optic facilities that Aureon's CEA network required.

6. Aureon's CEA network provides a through route between AT&T's long distance telephone network and the networks of other carriers, such as LECs, providing local telephone service, thus facilitating the origination and completion of AT&T's long distance calls.

7. Aureon's CEA service does not provide any service to end users, and does not provide local exchange service.

8. Aureon's CEA service is subject to competition from many carriers, including Onvoy, LLC (d/b/a Inteliquent), which is a Minnesota-based CEA service provider that also provides tandem access service in Iowa. **[BEGIN 3P HIGHLY CONFIDENTIAL]**

**[END 3P HIGHLY CONFIDENTIAL]**

9. In order to ensure that Aureon's tariff rate for CEA service remains affordable for AT&T's smaller competitors, the FCC imposed a mandatory terminating use policy for all IXC's sending traffic to LECs connected to Aureon's network.

10. The CEA network carries all types of traffic, including conference calling, access stimulation traffic of other carriers, or any other type of terminating traffic that an IXC routes to the CEA network. Access stimulation traffic generated as the result of a revenue sharing agreement has been carried by the CEA network at least since the mid-1990s. *See AT&T Corp. v. Jefferson Tel. Co.*, Memorandum Opinion and Order, 16 FCC Rcd. 16130, 16131 (during 1994 and 1995, Jefferson Telephone, an Aureon subtending LEC, shared revenues with a chat-line provider).

11. CEA traffic volume increased at the same time AT&T provided wholesale transport to other IXC's and routed that traffic to the CEA network. More recently, the CEA traffic volume has decreased as AT&T's volume of wholesale traffic has decreased.

12. Aureon does not have a choice in whether it will carry traffic that is sent to the CEA network by IXC's. The FCC's rules do not permit Aureon to block such traffic. Aureon has no control over any type of traffic delivered to the CEA network, and does not direct traffic to any LEC. Rather, Aureon merely delivers traffic to LECs based on the called party information passed on by the IXC's.

13. Aureon has expanded and augmented its fiber network in response to requests for additional capacity made by AT&T and other IXC's. Aureon has maintained appropriate structural and accounting separations between its Access and IXC Divisions in compliance with the FCC's rules.

14. Aureon's fiber network was, from its inception, intended to provide advanced features and modern information services to rural areas in Iowa.

15. Aureon provides CEA service to interexchange carriers ("IXCs"), such as AT&T. Through this service, Aureon provides IXCs with the use of Aureon's fiber optic cable network and access tandem switches to complete all types of long distance calls, including both calls to a single called party and conference calls involving multiple parties.

16. Aureon's CEA service concentrates the traffic of many of the nation's rural LEC networks at a single point where IXCs can connect their long distance facilities.

17. Aureon has not blocked LECs from connecting to its CEA network.

**B. Other Services Provided by Aureon**

18. Aureon, through its IXC Division and other divisions, offers a variety of advanced and modern services. Aureon's fiber network was, from its inception, intended to provide advanced features and modern information services to rural areas in Iowa.

19. Aureon provides "direct interconnections" to wireless carriers pursuant to interconnection agreements. Wireless traffic is treated differently than other traffic routed over the CEA network. IntraMTA wireless traffic is classified as local traffic.

20. Aureon was required by the IUB to provide direct interconnections to wireless carriers pursuant to negotiated agreements in order to be compensated for carrying wireless traffic. Specifically, in the Order issued in its *Transit Traffic* proceeding, the IUB stated, in relevant part, that "the duty to interconnect (and, therefore, the duty to carry traffic) applies to [Aureon] just as it does to the other parties, so if [Aureon] wants to be compensated for carrying [wireless] traffic it will have to participate in the negotiations and, if necessary, the subsequent arbitration proceeding." *In re Exchange of Transit Traffic*, DRU-00-2, 2002 WL 535299 (IUB Mar. 18, 2002).

**C. Access Stimulation Traffic**

21. Access stimulation occurs when a LEC has entered into an access revenue sharing agreement and the LEC either has had a three-to-one interstate terminating-to-originating traffic ratio in a calendar month, or has had a greater than 100 percent increase in interstate originating and/or terminating switched access minutes of use in a month compared to the same month in the preceding year.

22. An essential element of access stimulation is the requirement for an access revenue sharing agreement with a net payment. Aureon is not a party to an access revenue sharing agreement, and lacks knowledge of whether subtending CLECs have access revenue sharing agreements.



23. Subtending CLECs engaged in access stimulation are not permitted to bill anything to IXCs for terminating end office switching, but instead recover their costs from their end users.
24. Aureon is required to connect to IXCs and CLECs that request connections to the CEA network. Aureon is not permitted to block traffic to or from any IXC or LEC.
25. In order to ensure that Aureon's tariff rate for CEA service remains affordable for AT&T's smaller competitors, the FCC adopted a mandatory terminating use policy for all IXCs sending traffic to LECs connected to Aureon's network. The IUB required the CEA mandatory use policy to be implemented through traffic agreements.
26. All subtending LECs, whether ILECs or CLECs, enter into traffic agreements with Aureon for the transport of intrastate and interstate traffic to the LECs.
27. As required by the IUB, and to implement the mandatory use policy adopted by the FCC and the IUB, subtending LECs have entered into traffic agreements with Aureon since the inception of the CEA network in 1988. Those agreements require all traffic bound for subtending LECs to be routed over the CEA network.
28. Aureon does not know the identities of all entities that are engaged in access stimulation. Aureon's engineering department is able to identify significant spikes in traffic patterns and utilization of specific trunk groups, and those spikes are assumed to be conference bridge related traffic. Aureon separates "traditional" traffic from what Aureon has identified as suspected conference bridge traffic as a means to track increases or declines in both types of traffic.
29. Aureon's overall traffic volume for CEA service began decreasing in 2012, and by 2016, had decreased by 1,025,042,815 minutes annually from 3,833,504,867 minutes in 2011, to 2,808,462,052 minutes in 2016. Aureon Ex. 12, INS Introduction, Overview and Rate Development, July 3, 2012 FCC Annual Access Charge filing, at 2 (dated June 26, 2012) (3,833,504,867 minutes in 2011); AT&T Ex. 2, INS Worksheet, (Aureon\_02696-02708), at Aureon\_02698 (2,808,462,052 minutes in 2016). Aureon Ex. 15, INS Introduction, Overview and Rate Development, July 1, 2016 FCC Annual Access Charge Filing, at 2 (dated June 16, 2016) ("Interstate CEA minutes-of-use ('MOUs') declined at a rate of 16.90% during 2015 to 2,242,892,301 from 2,699,087,868 in 2014."), Aureon Ex. 14, INS Introduction, Overview and Rate Development, July 1, 2014 FCC Annual Access Charge Filing, at 2 (dated June 16, 2014) ("Interstate CEA minutes-of-use ('MOUs') declined at a rate of 21.37% during 2013 to 2,786,846,408 from 3,544,392,104 in 2012.").
30. In its 2014 through 2016 tariff filings, Aureon reported large negative rates of return. Aureon Ex. 14, INS 2014 Tariff Filing (filed June 16, 2014), Introduction, Overview and Rate Development at 2 (projected negative 202.18% rate of return for 2015). Ex. 15, INS 2016 Tariff Filing, Introduction, Overview and Rate Development at 2 (reported experiencing a negative 343.36% rate of return for 2015, an overall negative



219.08% rate of return for the 2014/2015 monitoring period, and projected a negative 171.69% rate of return for 2017).

31. Assuming all other rate development factors remain unchanged, as traffic volume increases, the CEA per minute rate decreases. As the traffic volume decreases, the CEA per minute rate increases.

32. Aureon's cost and traffic studies take into account the minutes of use for all traffic, including access stimulation traffic, in determining the CEA tariff rate.

33. Enforcing the CEA mandatory use policy will reduce the financial incentive for access stimulation. Aureon recently learned that as terminating end office switching rates have gone to zero, the primary source of revenue for access stimulation and sharing access revenue with conference call companies is now from transporting calls that bypass the CEA network. Requiring calls to CEA subtending LECs to be routed over the CEA network will eliminate the bypass transport revenue that is supporting access stimulation.

**D. Aureon's CEA Tariff and CEA Rate.**

34. Aureon's CEA service is described in Aureon's tariffs. *See* Iowa Network Access Division Tariff FCC No. 1, § 6.1, 4th Revised Page 88; Nebraska P.S.C. Tariff No. 3, § 6.1.1(A), Original Page 169; Iowa Tariff No. 1, § 6.1.1(A), 3rd Revised Page 141.

35. CEA service applies to all traffic from IXC's that is routed over the CEA network. There are no exemptions for any traffic routed over the CEA network, including, but not limited to, conference calls and access stimulation traffic. Aureon's cost studies and models take into account the projected minutes of use for all traffic, including access stimulation traffic, in determining the CEA tariff rate.

36. Aureon has revised the terms of INAD Tariff F.C.C. No. 1 as necessary over the years, and files its Tariff Review Plan ("TRP") with the FCC every two years. As a dominant carrier, Aureon is required to calculate its CEA rate and provide supporting cost and traffic data in accordance with Section 61.38, which ensures there is sufficient compensation to keep CEA service financially viable, as rates adjust to changes in CEA traffic volume and costs.

37. When Aureon revised the rate in its FCC tariff on June 17, 2013, Aureon filed the cost and usage data to support the calculation of the CEA tariff rate, and followed the filing procedures required by 47 C.F.R. § 61.38. Aureon also followed the procedures prescribed in Part 61, Subpart B, 47 C.F.R. § 61.13 et seq., for the filing of its tariff and transmittal letter, and the notice requirements in Section 61.58 of the FCC's rules in order for its tariff to be deemed lawful.

38. In its cost support data, for the test period ending June 30, 2014, Aureon projected interstate access minutes of 2,925,535,070, which represented a decrease of 12.40% from projected access minutes of 3,339,631,164 for the projected period ending June 30, 2013. Aureon proposed a tariff rate of \$0.00896, which was targeted to generate a return of 10.79% on investment for the projected test period ending June 30, 2014.

39. Aureon's cost support material was developed using the following procedures:
- a. Financial reporting was in accordance with Part 32 of the FCC's rules as adopted in Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telephone Companies, Report and Order, 51 Fed. Reg. 24745 (July 8, 1986) and 51 Fed. Reg. 43493 (Dec. 2, 1986), recon. denied in part and granted in part, Revision of the Uniform System of Accounts and Financial Reporting Requirements for Class A and Class B Telephone Companies (Parts 31, 33, 42, and 43 of the FCC's Rules, Memorandum Opinion and Order, 2 FCC Rcd. 1086 (1987), and all subsequent revisions to the rules adopted through the period June 14, 2013;
  - b. Jurisdictional allocation was in accordance with Part 36 of the FCC's rules as adopted in In re MTS and WATS Market Structure Amendment of Part 67 (New Part 36) of the Commission's Rules and Establishment of a Joint Board, Memorandum Opinion and Order on Reconsideration and Supplemental Notice of Proposed Rulemaking, 2 FCC Rcd. 5349 (1987), and all subsequent revisions to the rules adopted through the period June 14, 2013; and
  - c. Access rate development was performed in accordance with Part 69 of the FCC's rules as adopted in In re Amendment of Part 69 of the Commission's Rules and Regulations, Access Charges, to Conform it with Part 36, Jurisdictional Separations Procedures, Report and Order, 2 FCC Rcd. 6447 (1987), and subsequent modifications to the extent applicable to Aureon.
40. Cost allocations between Aureon and its affiliates were also performed in accordance with Parts 32 and Part 69 of the FCC's rules. Aureon's rates were set to comply with the maximum authorized rate of return as established by the FCC in In re Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd. 6786 (1990).
41. The rates that Aureon billed AT&T are the rates contained in the CEA tariffs.
42. Aureon has suffered large negative rates of return for the past several years. In 2013, Aureon filed a TRP in which it proposed its existing CEA rate of \$0.00896 per MOU. Aureon projected that under that proposal, it would earn a 10.79% rate of return, which was less than the FCC's prescribed rate of return of 11.25%, and maximum rate of return of 11.5%. When Aureon filed its 2014 TRP, Aureon reported that its 2013 rate of return was actually only 3.03%, rather than 10.79% as previously projected. Furthermore, Aureon decided that it would not increase its \$0.00896 per MOU CEA rate in its 2014 biennial tariff filing, even though this would result in a projected negative 202.18% rate of return for 2015. In its 2016 TRP, Aureon reported that it experienced a negative 343.36% rate of return for 2015, and an overall negative 219.08% rate of return for the 2014/2015 monitoring period. In its 2016 biennial tariff filings, Aureon again

proposed to maintain its existing CEA rate of \$0.00896 per MOU, which will result in a projected rate of return of negative 171.69% for 2017.

43. Aureon has utilized the same methodology for calculating its revenue requirement that was employed with its original tariff filing, which the Commission approved after rejecting AT&T's allegation that the cost support was insufficient.

44. Aureon is not required to file a new tariff, or revise its CEA tariff, for the delivery of calls to access stimulating LECs. Aureon does not know the identity of LECs that have access revenue sharing agreements and are involved in access stimulation. Moreover, access stimulation calls are treated just like any other type of traffic on the CEA network as Aureon's CEA rate takes all traffic, including access stimulation traffic, into account in its traffic and cost studies. If access stimulation traffic were removed from Aureon's cost studies, the CEA rate would increase for all IXC's in order for Aureon to meet its authorized revenue requirement.

45. Traffic volumes over the CEA network have fluctuated dramatically, and have had the effect of driving down CEA rates during the peak years of Aureon 2010 and 2012 studies. Aureon's traffic volume for CEA service began decreasing in 2012, and by 2016 had decreased by 1,025,042,815 minutes annually from 3,833,504,867 minutes in 2011, to 2,808,462,052 minutes in 2016 – which represents more than a 26% decline in CEA traffic volume.

46. Aureon's traffic volume for CEA service began decreasing in 2012, and by 2016 had decreased by 1,025,042,815 minutes annually from 3,833,504,867 minutes in 2011, to 2,808,462,052 minutes in 2016 – which represents more than a 26% decline in CEA traffic volume. AT&T controls almost 75% of all CEA traffic over the last year. AT&T's wholesale transport service for access stimulation traffic has made traffic projections more difficult. Aureon suspects that AT&T's wholesale service has increased the volume of access stimulation traffic on the CEA network by adding traffic to the CEA network that previously had been carried by transport providers that are circumventing the CEA network.

47. INAD – Aureon's operating division that provides CEA service – is classified by the Commission as a dominant carrier subject to Section 61.38. The rate caps in the 2011 *Connect America Order* apply to non-dominant ILECs and CLECs.

48. Section 61.38 carriers engaged in access stimulation are not required to revise their tariffs if their tariff rates already reflect the additional traffic volume from access stimulation.

49. AT&T has engaged in unlawful traffic dumping by failing to pay the majority of the CEA invoice amounts billed to AT&T since August 2013.

#### **E. The 2011 Connect America Fund Order**

50. In its 2011 *Connect America Fund Order*, 26 FCC Rcd 17663 (2011), the Commission only adopted rate caps for incumbent ILECs and CLECs that the FCC has

classified as non-dominant. INAD – Aureon’s operating division that provides CEA service – is classified by the Commission as a dominant carrier subject to Section 61.38.

51. Aureon provides CEA service. Aureon is not an ILEC or a CLEC. Aureon is a dominant provider of CEA service.

52. The rate caps in the 2011 *Connect America Order* apply to non-dominant ILECs and CLECs. Aureon is not an ILEC or a CLEC, and the FCC’s rate cap rules do not apply to Aureon.

53. Aureon is not engaged in access stimulation. Aureon does not have, and has not had, any revenue sharing agreements with any entity. Aureon has no control over the traffic sent by other carriers over Aureon’s network.

54. Although Aureon is not engaged in access stimulation, Section 61.38 carriers engaged in access stimulation are not required to revise their tariffs if their tariff rates already reflect the additional traffic volume from access stimulation.

55. No agreement is necessary for Aureon to provide CEA service to AT&T. Aureon’s CEA tariff covers all traffic routed over the CEA network. CEA service was designed for all types of traffic, including, but not limited to, conference calls and access stimulation traffic as Aureon’s cost studies take such traffic into account in calculating the CEA rate. Access stimulation involves both terminating and originating traffic. For example, in the pending forbearance proceeding, AT&T has indicated that access stimulation includes originating 800 traffic.

#### **F. CEA Traffic and Traffic Agreements**

56. CEA service and the CEA rate set forth in Aureon’s tariffs apply to all traffic, both terminating and originating traffic. CEA service has succeeded in making it attractive for fifteen IXC’s to use the CEA network to originate traffic and for seventeen IXC’s to use the CEA network to terminate traffic.

57. CEA service includes terminating transport service. Such service provides traffic concentration essential to maintaining competition among IXC’s to terminate calls to rural areas and to prevent increases to the CEA tariff rate.

58. The CEA tariff rate in Aureon’s interstate tariff is referred to as the switched transport rate. That single switched transport rate recovers the costs of both transport and tandem switching. ILECs, including AT&T’s ILEC operations, bill separate tandem switching and distance-sensitive transport rates to recover their costs for each of those rate elements. In order to make rural areas more attractive for small IXC’s to serve, Aureon charges a non-distance sensitive switched transport rate that provides IXC’s with access to the more than 2,700-mile CEA network.

59. Traditional CEA traffic routed by IXC’s to Aureon’s CEA network is no different than access stimulation traffic routed to Aureon for switching and transport to subtending LECs, and Aureon treats that traffic as required under Aureon’s CEA tariff.

60. The CEA mandatory use policy imposed by the FCC and the IUB ensures that the CEA rate remains affordable for all IXC's, including AT&T's smaller competitors. The CEA mandatory use policy was not a requirement imposed by Aureon. The removal of large volumes of traffic from the CEA network would violate the FCC's CEA mandatory use policy. In AT&T's complaint proceeding against Great Lakes, the parties stipulated that **[[BEGIN 3P HIGHLY CONFIDENTIAL]]** [REDACTED]

**[[END 3P HIGHLY CONFIDENTIAL]]** By contrast, Aureon's interstate CEA minutes-of-use for the period ending June 30, 2017 are projected to be only 2,508,443,160. The amount of the traffic bypassing Aureon's network in violation of the Commission's CEA mandatory terminating use rule is unknown at this time. However, given that the amount of traffic terminated by Great Lakes alone was approximately **[[BEGIN 3P HIGHLY CONFIDENTIAL]]** [REDACTED] **[[END 3P HIGHLY CONFIDENTIAL]]** the amount of traffic that Aureon is projected to carry for all IXC's for an entire year, the CEA tariff rate can be significantly reduced by enforcing the Commission's CEA mandatory use policy. As the amount of traffic on the CEA network increases, the CEA rate decreases. Enforcing the CEA mandatory use policy will also eliminate the financial incentives that encourage access stimulation. If the traffic had been routed through the CEA network as required by the FCC's CEA mandatory termination policy, the bypass transport revenue supporting access stimulation would have been eliminated, and Aureon's CEA rate would have been significantly reduced not just for AT&T, but also for all of AT&T's smaller IXC competitors serving customers in rural Iowa.

61. The rates and costs of other CEA service providers are not comparable to Aureon's rates and costs. For example, the rates and costs for South Dakotan Network, LLC ("SDN") are not comparable to Aureon's because SDN did not build an entirely new, more than 2,700 mile, CEA network.

62. Aureon's CEA interstate rate is a single switched transport rate that provides access to more than 2,700 miles of fiber to reach all of the subtending LECs connected to the CEA network. By contrast, non-CEA services are tailored to specific customer needs, and only involve small amounts of transport and capacities. The CEA rate required to make a comprehensive more than 2,700 mile rural network of common trunks available to all IXC's on a non-discriminatory basis cannot be rationally compared to a single lease for transport between only two geographic points, or to the limited service provided for land-to-mobile traffic or the point-to-point transport provided by third parties without all the CEA functions.

63. In order to make rural areas more attractive for small IXC's to serve, Aureon charges a non-distance sensitive switched transport rate that provides IXC's with access to the more than 2,700-mile CEA network.

64. The fact that Aureon's CEA rate follows trends different than that for access charges is unsurprising given that CEA service is a different type of access service than the more limited service provided by LECs. Unlike access service provided by LECs, which involves a separate switched access rate and a distance sensitive transport rate,

Aureon's interstate CEA service is provided pursuant to a single tariff rate that is referred to as the switched transport rate. That single switched transport rate recovers the costs of both transport and tandem switching. In order to make rural areas more attractive for small IXC's to serve, Aureon charges a non-distance sensitive switched transport rate that provides IXC's with access to the more than 2,700-mile CEA network. CEA service provided by Aureon, and access service provided by LECs, are not the same type of access service.

65. Subtending CLECs engaged in access stimulation are not permitted to bill anything to IXC's for terminating end office switching, but instead recover their costs from their end users.

66. Aureon is required to connect to IXC's and CLECs that request connections to the CEA network. Aureon is not permitted to block traffic to or from any IXC or LEC.

67. The cost for transporting access stimulation traffic is the same for transporting traditional traffic as all traffic is taken into account in Aureon's traffic and cost studies.

68. Aureon's CEA service is not necessary for CLECs to engage in access stimulation. Indeed, **[[BEGIN 3P HIGHLY CONFIDENTIAL]]**

**[[END 3P HIGHLY CONFIDENTIAL]]** The large volume of traffic bypassing Aureon's network demonstrates that access stimulation can and has been accomplished without the use of the CEA network.

69. None of the traffic agreements with the subtending LECs require payment by the subtending LECs because they are not Aureon's customers. Rather, Aureon's customers are the IXC's that use the CEA Network.

70. Access stimulation traffic has resulted in financial losses for Aureon. AT&T has engaged in unlawful traffic dumping. AT&T ordered more circuits, Aureon built the requested capacity, and then AT&T refused to compensate Aureon.

71. In its tariff filings, Aureon has reported millions of dollars in infrastructure upgrades over the past several years. However, any gains realized by network infrastructure upgrades made to Aureon's fiber network over the past several years have been offset by increases in access stimulation traffic volumes, and the need to augment facilities in order to handle that traffic.

72. Aureon's CEA rate and cost studies have been performed in accordance with Section 61.38 and Parts 32, 36, 64, and 69 of the FCC's rules as they apply to dominant carriers. Aureon has properly calculated its CEA revenue requirement and CEA tariff rates using proper accounting methods and in accordance with the Commission's rules. Aureon has utilized the same methodology for calculating its revenue requirement that was employed with its original tariff filing, which the Commission approved after rejecting AT&T's allegation that the cost support was insufficient.

**G. Facts Regarding Aureon's Structural Separations and Accounting**

73. The FCC's *Fifth Report and Order* in the Competitive Common Carrier Services proceeding<sup>3</sup> prohibited Aureon's Access Division from jointly owning the transmission and switching facilities with Aureon's IXC Division. The *Fifth Report and Order* required a carrier's access division to "have separate books of account, and must not jointly own transmission or switching facilities" with its IXC Division.<sup>9</sup> The Commission mandated this corporate arrangement in order to "protect[] against cost-shifting and anticompetitive conduct . . . ."<sup>4</sup> As required by the *Fifth Report and Order*, Aureon created separate corporate divisions which facilitated access services (i.e., the Access Division), and competitive services (i.e., the IXC Division). Aureon's division of its CEA and interexchange services between the Access and IXC Divisions, respectively, was approved by the Commission at the time it granted Aureon's Section 214 authorization in 1989.<sup>5</sup>

74. All of Aureon's costs are separated into appropriate regulated and non-regulated accounts, and Aureon has used independent third-party consultants to prepare Aureon's cost studies to ensure that its TRP filings are accurate, and comply with the Commission's accounting rules. Since all CWF investment in Account 2410 is assigned to the IXC Division, all Account 6410 undistributed expenses are thereby assigned to the IXC Division. Network lease costs are periodically tested for reasonableness based on an analysis of costs derived from the IXC Division.

75. In order to determine the lease rate that the IXC Division would charge the Access Division, Aureon first calculated the lease rate that would recover the IXC Division's fully distributed costs for leasing facilities to the Access Division. Then, Aureon's management selected a lease rate that was less than the rate required to recover the IXC Division's fully distributed costs. Because the lease rate booked to the Access Division was less than the amount required to recover the IXC Division's fully distributed costs, there was no cross-subsidization of the IXC Division by the Access Division.

76. The Commission's accounting rules do not require the tariff cost support to include lease rates. Nevertheless, Aureon's tariff filings do disclose all the information necessary to calculate the lease rate paid to the IXC Division for fiber: the result of dividing the transport costs by the reported minutes of use.

77. Aureon's cost allocations for the Access Division's use of Aureon's fiber network are compliant with the Commission's accounting rules. These cost allocations are based

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<sup>3</sup> *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, Fifth Report and Order, 98 F.C.C.2d 1191 (1984) ("*Fifth Report and Order*"). <sup>9</sup> *Fifth Report and Order*, 98 F.C.C.2d at 1198-99, ¶ 9.

<sup>4</sup> *Id.*

<sup>5</sup> *FCC 214 Order*, 3 FCC Rcd. at 1469, ¶ 10.



on the actual use of facilities provided to the Access Division at lease rates that are at or below the fully distributed cost of the network facilities provide

78. In the *FCC 214 Order*, the Commission FCC conditioned its grant of Section 214 authority on state regulatory agencies requiring “[Northwestern Bell (“NWB”)] [to] use the [CEA] system for NWB’s intrastate, intraLATA toll calls . . . .” *FCC 214 Order*, 3 FCC Rcd. at 1473, ¶ 32. The FCC further stated that “[i]f the appropriate state agencies [did] not approve [the Access Division’s] arrangement as proposed here . . . [the FCC] would need to review [the Access Division’s] proposal” as a result of the failure of the state agencies to require mandatory use by NWB for intrastate, intraLATA toll calls. *Id.* In the *FCC 214 Recon. Order*, the Commission specifically addressed the issue of whether the Section 214 condition had been satisfied, and ruled that the Access Division submission of its state authorization satisfied the FCC’s condition.<sup>6</sup> There was no requirement for Aureon to bring to the FCC’s attention a change to the PIU factor.

79. It was appropriate for Aureon to include uncollectible revenues as an expense in its tariff filings. The uncollectible revenues represent amounts that Aureon properly billed for CEA service provided under its CEA tariff to other carriers. Uncollectible revenues are a known direct cost, i.e., a reduction in net operating income, of providing CEA service. As such, the cost of uncollectible revenues is properly included in Aureon’s cost studies as those revenues directly relate to the forecast minutes-of-use that are also used in those studies.

#### **H. CEA Service Provided by Aureon to AT&T**

80. Great Lakes Communication Corporation (“GLCC”) is listed in Aureon’s FCC tariff as a LEC that has elected to route traffic via the CEA network.

81. Because GLCC has chosen to interconnect with Aureon’s network, the CEA tariffs require AT&T to interconnect with Aureon’s network for traffic originating from or terminating to GLCC’s facilities.

82. Since AT&T began withholding payment to Aureon, AT&T has ordered additional trunks to route additional traffic to GLCC’s network.

83. Aureon has incurred additional costs to provision those additional trunks ordered by AT&T, but AT&T has not paid Aureon any compensation to recover the costs of the additional trunks ordered by AT&T.

84. For the period AT&T has objected to Aureon’s invoices, AT&T ordered CEA service to complete calls for AT&T’s customers placed to exchanges served by LECs that subtend Aureon’s CEA tandem.

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<sup>6</sup> *FCC 214 Recon. Order*, 4 FCC Rcd. at 2201, ¶ 7 (“[W]e conclude INAD’s [the Access Division’s] state authority satisfies our condition.”).



85. For the period AT&T has objected to Aureon's invoices, Aureon provided CEA service to AT&T pursuant to those orders.

86. For the period AT&T has objected to Aureon's invoices, AT&T used CEA service to complete AT&T's customers' telephone calls.

87. AT&T received money from its wholesale customers for routing calls over Aureon's CEA network.

### III. AT&T's Disputed Facts

#### A. CEA Service

1. With regard to the dispute set forth in the Formal Complaint, AT&T functions as a purchaser of telecommunications services, not as a common carrier.

2. With regard to the disputes set forth in the Formal Complaint, Aureon functions as a common carrier, and specifically as a LEC.

3. CEA service was developed in the mid-1980s to facilitate the roll-out of equal access service following AT&T's divestiture of the Bell Operating Companies in January 1984.

4. A critical feature of equal access service is "1+" dialing on originating long distance calls; 1+ dialing automatically directs all long distance numbers to the customer's chosen (or "presubscribed") long distance carrier.

5. Equal access concerns the ability to place calls, not to receive them, and therefore is, by its very nature, an originating service.

6. In 1986, the Commission approved the provision of CEA service in Indiana. *In re Application of Ind. Switch Access Div.*, File No. W-P-C-5671, 1986 WL 291436, ¶¶ 2–15 (F.C.C. Apr. 10, 1986) ("*Indiana Switch CCB Order*"), *on review* 1 FCC Rcd. 634, ¶ 5 (1986) ("*Indiana Switch Review Order*").

7. The Commission has also approved applications for CEA service in South Dakota and Minnesota. *See In re the Application of SDCEA, Inc.*, 5 FCC Rcd. 6978, ¶¶ 24–25 (1990) ("*SDCEA Order*"); AT&T Ex. 12, Memorandum Opinion, Order and Certificate, *In re Application of Minn. Indep. Equal Access Corp.*, File No. W-P-C-6400, ¶¶ 15–16 (F.C.C. rel. Aug. 22, 1990) ("*MIEAC Order*").

8. CEA service was designed to achieve two main objectives: (a) to "centralize" the equal access function at a tandem switch, thereby sparing the small, rural ILECs the direct costs of converting their switches to equal access; and (b) to permit the aggregation of traffic from scores of small, rural ILECs at the CEA tandem switch via a fiber network, thereby providing a more efficient means of transporting small volumes of traffic between each IXC and each of the many small, rural ILECs.

**B. The Expansion of Aureon's Business and Services**

9. In or about 2005, Aureon began to transport access stimulation traffic.

10. Aureon's decision to carry large volumes of access stimulation traffic resulted in increased MOUs and revenues for Aureon; more specifically, Aureon's annual throughput and revenue increased from 950 million MOUs and \$10 million in revenue in 2005, to over 3.8 *billion* MOUs and nearly \$32 million in revenue in 2011. Substantially all of the growth in MOUs and revenues was the result of "call aggregation," which is access stimulation traffic.

11. Aureon's MOUs and revenues have decreased since 2011, and Aureon has attributed the decreases to both declines in Aureon's non-access stimulation traffic, as well as its access stimulation traffic.

12. Aureon has used the increased revenues from access stimulation traffic to expand and improve its fiber network, to expand its business, and to subsidize its competitive services.

13. Aureon currently offers a wide range of competitive network services over a fiber network that Aureon funded and initially built to provide CEA service, including network transport, data network services, Internet services, and wholesale voice services.

14. According to Aureon's 2004 Tariff Filing, Aureon's interconnection agreements "remove[d] interstate traffic from the network and replace[d] it with interconnection traffic to be billed in accordance with interconnection agreements." AT&T Ex. 15, INS Introduction, Overview and Rate Development, July 1, 2004 FCC Annual Access Charge Tariff Filing, at 2 (filed June 24, 2004).

**C. Nature and Growth of Access Stimulation**

15. On account of CLECs having "bottleneck monopolies" on calls placed to their customers, combined with Commission rules against IXCs blocking such calls, once a CLEC decides to engage in access stimulation and designates how access stimulation is to be routed to its end office switch, the IXCs are billed access charges on that route, regardless of whether that particular route is efficient or cost-effective.

16. CLECs engaged in access stimulation have obvious incentives to increase the access revenues available to be shared by the participants in the access stimulation scheme.

17. Consistent with those incentives, CLEC access stimulation schemes have grown rapidly since 2005.

18. In its 2006 Tariff Filing, Aureon stated that "[t]he higher than normal increase in interstate traffic for the projected test period results primarily from a significant increase in toll aggregator traffic which began to appear during the last quarter of 2005." *See*

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AT&T Ex. 16, INS Introduction, Overview and Rate Development, July 3, 2006 FCC Annual Access Charge Tariff Filing, at 1–2 (filed June 26, 2006).

19. Table 1 below reflects the changes in Aureon’s interstate access minutes and interstate revenue for the period 2005 to 2015.

	TABLE 1	
	<u>Interstate Access Minutes</u> <sup>7</sup>	<u>Interstate Access Revenues</u> <sup>8</sup>
2005	954,245,936	\$9,838,276
2006	1,570,363,583	\$14,808,529
2007	1,844,725,157	\$15,772,400
2008	2,171,054,422	\$18,171,726
2009	2,982,269,940	\$24,424,791
2010	3,679,806,752	\$30,137,617
2011	3,883,504,867	\$31,805,905
2012	3,544,392,104	\$25,555,067
2013	2,786,846,408	\$21,166,098
2014	2,699,087,868	\$24,183,827
2015	2,242,892,301	\$20,096,315

20. In Iowa, for access stimulation schemes to work when they were first implemented in 2005, it was imperative that the access stimulating CLECs enter into

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<sup>7</sup> The Interstate Access Minutes are sourced from AT&T Ex. 16, INS 2006 Tariff Filing; Ex. 17, INS Introduction, Overview and Rate Development, July 1, 2008 FCC Annual Access Charge Filing (filed June 24, 2008) (“INS 2008 Tariff Filing”); AT&T Ex. 18, INS Introduction, Overview and Rate Development, July 1, 2010 FCC Annual Access Charge Filing (filed June 16, 2010) (“INS 2010 Tariff Filing”); AT&T Ex. 19, INS Introduction, Overview and Rate Development, July 3, 2012 FCC Annual Access Charge Filing (filed June 26, 2012) (“INS 2012 Tariff Filing”); AT&T Ex. 20, INS Introduction, Overview and Rate Development, July 2, 2013 FCC Annual Access Charge Filing (filed June 17, 2013) (“INS 2013 Tariff Filing”); AT&T Ex. 21, INS Introduction, Overview and Rate Development, July 1, 2014 FCC Annual Access Charge Filing (filed June 16, 2014) (“INS 2014 Tariff Filing”); and AT&T Ex. 22, INS Introduction, Overview and Rate Development, July 1, 2016 FCC Annual Access Charge Filing (filed June 16, 2016) (“INS 2016 Tariff Filing”).

<sup>8</sup> The Interstate Access Revenues were generated by multiplying INS’s Interstate Access Minutes by the applicable INS interstate CEA rate. The applicable rates by year are: \$0.01031/min. (2005); \$0.00943/min. (2006); \$0.00855/min. (2007); \$0.00837/min. (2008); \$0.00819/min. (2009–11); \$0.00721/min. (2012); \$0.007595/min. (2013); and \$0.00896/min. (2014–2016). The rates for the years 2006, 2008, 2012 and 2013 reflect the fact that the rate changed mid-year.

agreements with Aureon to transport their traffic from Des Moines to the local areas where these CLECs were operating.

21. Aureon projected additional increases in call aggregation traffic in subsequent tariff filings. AT&T Ex. 17, INS Introduction, Overview and Rate Development, July 1, 2008 FCC Annual Access Charge Filing, at 3–4 (dated June 24, 2008) (for the test period ending June 30, 2009, Aureon “projects 1.6 billion terminating conference call minutes generated by call aggregators”); AT&T Ex. 19, INS Introduction, Overview and Rate Development, July 3, 2012 FCC Annual Access Charge Filing, at 2 (dated June 26, 2012) (“aggregator traffic is projected to increase 1.2%”); AT&T Ex. 22, INS Introduction, Overview and Rate Development, July 1, 2016 FCC Annual Access Charge Filing, at 2 (dated June 16, 2016) (“IXC traffic delivered to LECs providing service to call aggregators is projected to increase 6.53%”).

22. The reason these CLECs needed Aureon’s terminating transport service was not to provide equal access service to local residential and business customers, but because without it they could not engage in access stimulation.

23. Starting in or around 2005, Aureon agreed to enter into contracts, typically called “Traffic Agreements,” with CLECs pursuant to which access stimulation traffic would be transported over its network and billed at CEA rates.

24. **[[BEGIN CONFIDENTIAL]]** [REDACTED]  
**[[END CONFIDENTIAL]]**

25. **[[BEGIN CONFIDENTIAL]]** [REDACTED]  
**[[END CONFIDENTIAL]]**

26. By entering into those Traffic Agreements, Aureon has greatly facilitated the growth of access stimulation in Iowa.

27. **[[BEGIN CONFIDENTIAL]]** [REDACTED]  
**[[END CONFIDENTIAL]]**

Aureon has improperly colluded with the access stimulating CLECs, depriving AT&T and other IXCs of more cost-effective transport alternatives.

28. In its 2011 Connect America Fund Order, 26 FCC Rcd 17663 (2011) (“*Connect America Order*”), the Commission adopted reforms meant to “curtail” access stimulation.

However, since that time, access stimulation has continued to flourish in Iowa and certain other states.

29. Other alternatives to Aureon's CEA service exist for delivering the large volumes of traffic associate with access stimulation.

30. One such alternative is a direct trunking arrangement from the IXC to the access stimulating CLEC's end office. Based on the volumes of AT&T traffic delivered to Great Lakes during 2014 and 2015, a direct trunking arrangement at the rates for such service charged by CenturyLink would save AT&T over **[[BEGIN CONFIDENTIAL]]** **[[END CONFIDENTIAL]]** compared to Aureon's tariffed CEA rates.

31. A second alternative is a contract with Aureon for a service that delivers traffic to Great Lakes and other access stimulating CLECs. AT&T employs a similar arrangement with South Dakota Network, LLC ("SDN"), the CEA provider in South Dakota, with respect to traffic delivered to Northern Valley Communications Corp. ("NVC"), a major access stimulating CLEC. **[[BEGIN HIGHLY CONFIDENTIAL]]** **[[END HIGHLY CONFIDENTIAL]]**

32. **[[BEGIN CONFIDENTIAL]]** **[[END CONFIDENTIAL]]**

**D. Facts Related to Aureon's Unlawful Imposition of CEA Rates on Access Stimulation Traffic**

33. Aureon's tariff states only that it applies to "Centralized Equal Access Service," and not to other types of access services, like those provided on the access stimulation traffic at issue.

34. There have been no significant changes in the terms of Tariff F.C.C. No. 1 since it was filed in 1988.

35. Except for recent tariff filings, in which Aureon initially proposed a contract tariff ("High-Volume Traffic Contract No. 1") for delivery of calls to access stimulating CLECs and now offers a "volume discount" presumably for such traffic, Aureon has not filed a new tariff, or revised its CEA tariff, to cover delivery of calls to access stimulating CLECs.

36. CEA service was not designed for and was not intended for use with access stimulation traffic.

37. Terminating transport service is not a necessary component of CEA service.
38. The services provided by FCPs associated with the access stimulating CLECs that connect to IXC's via Aureon almost exclusively entail the IXC's long distance customers placing calls to the FCPs' conference and chat equipment located at the access stimulating CLEC's central office. Consequently, FCPs have no need to place any long distance calls, and thus no need for equal access service.
39. The volume and nature of legitimate CEA traffic differs markedly from access stimulation traffic.
40. Legitimate CEA traffic involves: very low volumes of traffic routed to a large number of small rural LECs, a roughly balanced mix of originating and terminating traffic; and a roughly balanced mix of interstate and intrastate traffic. Further, the calls are directed to, or originate from, ordinary rural residential and business customers.
41. By contrast, Aureon's access stimulation traffic involves: massive calling volumes that are transported to a small handful of CLECs using a limited number of high capacity telephone lines assigned to FCPs that have nothing in common with ordinary rural residential and business customers; almost entirely terminating calls; and almost entirely interstate calls.
42. The actual cost of transporting access stimulation traffic is much lower than its tariffed CEA rate.
43. That low actual cost is demonstrated, among other things, by **[[BEGIN CONFIDENTIAL]]** **[[END CONFIDENTIAL]]**
44. Aureon's insistence on imposing a "mandatory use" requirement on calls to access stimulating CLECs has created a price umbrella that access stimulating CLECs have exploited. **[[BEGIN CONFIDENTIAL]]** **[[END CONFIDENTIAL]]**
45. On account of their obligation to complete access stimulation calls, IXC's needing to deliver calls to an access stimulating CLEC in Iowa face two unfavorable choices: pay Aureon's tariffed CEA rate; or pay an unreasonable premium for a direct connection.

**E. The 2011 Connect America Order**

46. In its 2011 Connect America Fund Order, 26 FCC Rcd 17663 (2011) ("*Connect America Order*"), the Commission addressed concerns related to access stimulation traffic, and it adopted new rules with respect to switched access charges in connection with access stimulation traffic.

47. The *Connect America Order* establishes two “conditions” (or triggers) that “identify when an access stimulating LEC must refile its interstate access tariffs.” *Id.* ¶ 667. “The first condition is that the LEC has entered into an access revenue sharing agreement,” and the “second condition is met where the LEC either has had a three-to-one interstate terminating-to-originating traffic ratio in a calendar month, or has had a greater than 100 percent increase in interstate originating and/or terminating switched access MOU in a month compared to the same month in the preceding year.” *Id.* Where the second condition is met, there is a “rebuttable presumption” that “revenue sharing is occurring and the LEC has violated the Commission’s rules.” *Id.* ¶ 699.

48. The *Connect America Order* further provides that “[i]f a LEC meets both conditions of the definition [of access stimulation], it must file a revised tariff . . . .” *Id.* ¶ 679.

49. In its *Connect America Order*, the Commission also adopted a series of rules relating more generally to the reform of intercarrier compensation. See *Connect America Order* ¶¶ 799–801; 47 C.F.R., Part 51, Subpart J. Under the Commission’s “rate cap” rules, LECs “are required to tariff rates no higher than the default transitional rate[],” *i.e.*, the capped rate. See 47 C.F.R. § 51.905(b). Under the “rate parity” rules, LECs are required to reduce their intrastate rates to be at parity with their capped interstate rates, and they were required to do so by July 1, 2013. See *Connect America Order* ¶¶ 35, 804 & Figure 9.

**F. Facts Related to Aureon’s Violation of the Commission’s Rate Cap, Rate Parity, and Access Stimulation Rules**

50. Aureon provides exchange access service.

51. Aureon is a LEC, and has conceded that it is a LEC in other proceedings.

52. Following adoption of the Commission’s rate cap rules pursuant to the *Connect America Order*, Aureon did not cap its rates.

53. Aureon’s intrastate rates have at all relevant times been \$0.0114 per minute for CEA switching services plus \$0.0003 per minute, per mile for transport. Those rates exceed Aureon’s capped interstate rate of \$0.00819 per minute (which covers both CEA switching and transport), as well as the current tariffed rate of \$0.00896.

54. The amounts of Aureon’s invoices that AT&T has continued to pay are based on AT&T’s estimates of the amount of Aureon’s traffic that is not access stimulation traffic; for that traffic, which includes both interstate and intrastate traffic, AT&T has paid Aureon at the rate of \$0.00819.

55. Aureon is one of the nation’s largest access stimulating LECs.

56. Without the Aureon traffic agreements, access stimulation calls could not initially have been completed and, as a consequence, there would have been no revenue for the access stimulating CLECs to share with their FCP partners.



57. Aureon has financially benefited from the access stimulation traffic transported pursuant to these traffic agreements with access stimulation CLECs because the large increase in traffic on Aureon's network led to a large increase in the amount of access traffic for which Aureon has billed.

58. Following adoption of the Commission's access stimulation rules pursuant to the *Connect America Order*, Aureon did not amend its CEA tariff or its billed rates to reflect the fact that Aureon was engaged in access stimulation.

59. Nationwide, AT&T is currently billed for terminating switched access charges by approximately 1,300 LECs. Aureon is responsible for over 12 percent of AT&T's total, nationwide billed terminating switched access expense.

**G. Facts Related to Aureon's Improper and Unreasonable Rate Manipulation**

60. Since its formation, Aureon has not provided service as a single entity that owned both the equal access switching capability (the access tandem) as well as the transmission facilities (the fiber network). Instead, Aureon established two separate operating divisions: the Access Division and the IXC Division.

61. The Access Division provides, pursuant to tariff, CEA service; the IXC Division provides competitive services such as long distance service.

62. The fact that Aureon's call volumes have declined somewhat since 2011 does not explain why during the period 1998 to 2010 switched access rates declined by almost 80 percent but Aureon's rates only declined by 23 percent.

63. Aureon does not dispute that its network costs constitute a significant percentage of the Access Division's overall revenue requirement, or that the percentage continues to increase.

64. The Access Division's network costs account for as much as 75 percent of its revenue requirement.

65. The basis for calculation of the lease costs allocated to Aureon's Access Division is not explained in either Aureon's Tariff Filings or in the support material produced as part of the informal discovery process. The evidence regarding Aureon's network costs that does exist shows that **[[BEGIN CONFIDENTIAL]]**

**[[END CONFIDENTIAL]]**

66. In recent years, Aureon's investment in its fiber network has increased dramatically notwithstanding that the overall demand for Aureon's access service has been decreasing. Further, the network costs allocated to the Access Division have been increasing as a percentage of its revenue requirement even though the demand for access service has been declining.



67. Because of Aureon's decision to engage in access stimulation, which involves almost entirely interstate calls, Aureon has shifted the costs of CEA service to interstate ratepayers.

68. Aureon did not bring to the Commission's attention that the change to its PIU factor would have a dramatic impact on the assumption underlying the Commission's initial approval of CEA service in Iowa that "the majority of network costs would be recovered from intraLATA toll calls."

69. The traffic forecasts used in Aureon's tariff filings vary widely from year to year and are not reliable when compared to actual demand for Aureon's access services.

70. The uncollectible revenues that Aureon has included in its revenue requirement are all subject to litigation where it is asserted that the amounts were not properly billed.

71. Aureon's inclusion of uncollectible revenues in Aureon's revenue requirement has had a potential rate impact of between 0.074 cents per minute and 0.68 cents per minute.

#### **IV. KEY LEGAL ISSUES**

##### **A. Aureon's Key Legal Issues**

1. Whether Aureon billed AT&T valid tariff rates for all traffic that AT&T routed over the CEA network, including access stimulation traffic;

2. Whether AT&T must pay Aureon the tariff rates for all traffic that Aureon billed AT&T plus late payment interest and attorneys' fees;

3. Whether AT&T has engaged in unlawful traffic dumping by increasing the volume of traffic on the CEA network with no intention of compensating Aureon;

4. Whether no change should be made to the tariff rate that would apply going forward because the tariff rate was properly calculated in accordance with the accounting rules and accurate cost and traffic studies;

5. Whether Aureon is not engaged in access stimulation, whether the traffic agreements are lawful and are not access revenue sharing agreements;

6. Whether the Commission should enforce the CEA mandatory use policy in order to eliminate the bypass revenue sharing that is supporting access stimulation.

7. Whether the LEC rate caps do not apply to Aureon, as it is not an ILEC or CLEC and CEA service is not provided to end users that could transition to bill-and-keep; and

8. Whether AT&T must comply with the FCC's CEA mandatory use policy in order to promote rural competition with an affordable CEA network for AT&T's competitors,

and therefore, AT&T is prohibited from using direct trunks to remove AT&T's traffic (which is now most CEA traffic) from the CEA network.

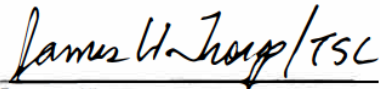
**B. AT&T's Key Legal Issues**

1. Whether Aureon's provision of CEA service in connection with access stimulation traffic is unlawful under its tariff and Sections 201 and 203 of the Act;
2. Whether Aureon has unlawfully filed a tariff with rates that violate the Commission's rate cap and rate parity rules;
3. Whether Aureon has violated Sections 201 and 203 of the Communications Act because it engaged in access stimulation and failed to file revised tariffs;
4. Whether Aureon improperly manipulated its rates in violation of Section 201(b) through a variety of improper accounting measures, including its lease cost calculations, cost allocations, and inclusion of improperly billed charges in its revenue requirement as "Uncollectible Revenues";
5. Whether, as a result of the above determinations: (i) AT&T is not liable for the CEA rates that Aureon has billed AT&T on access stimulation traffic; and (ii) Aureon must refund amounts it improperly billed to AT&T, and which AT&T paid, in amounts to be determined in a subsequent proceeding; and
6. Also, to be determined in a subsequent proceeding, what a reasonable rate for Aureon's CEA service is on a going forward basis, and whether customers are permitted to pursue refunds, if the Commission determines that Aureon engaged in "furtive concealment" of violations of the Commission's rules by using improper accounting methods.

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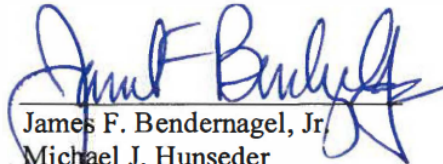
Dated: July 20, 2017

Respectfully submitted,



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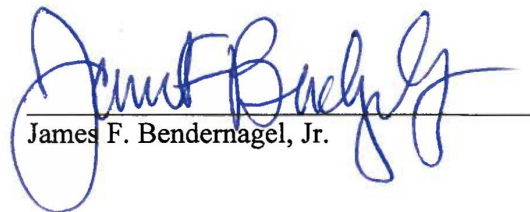
**CERTIFICATE OF SERVICE**

I hereby certify that on July 20, 2017, I caused a copy of the foregoing Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues to be served as indicated below to the following:

Marlene H. Dortch  
Office of the Secretary  
Market Disputes and Resolution Division  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington, DC 20554  
(Original of the Confidential Version, the  
Highly Confidential Version, and the  
Third Party Highly Confidential Version  
via Hand Delivery)

Lisa Griffin  
Anthony DeLaurentis  
Sandra Gray-Fields  
Christopher Killion  
Enforcement Bureau  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington, DC 20554  
(One Copy of the Third Party  
Highly Confidential Version via E-mail;  
Three courtesy hard copies of the Third  
Party Highly Confidential Version  
via Hand Delivery)

Respectfully submitted,



James F. Bendernagel, Jr.

**PUBLIC VERSION**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

**In the Matter of**

**AT&T CORP.  
One AT&T Way  
Bedminster, NJ 07921  
202-457-3090**

*Complainant,*

**Proceeding Number 17-56  
File No. EB-17-MD-001**

v.

**IOWA NETWORK SERVICES, INC.  
d/b/a Aureon Network Services  
7760 Office Plaza Drive South  
West Des Moines, IA 50266  
(515) 830-0110**

*Defendant.*

**JOINT STATEMENT ON SETTLEMENT,  
DISCOVERY AND SCHEDULING  
PURSUANT TO 47 C.F.R. §§ 1.733(b)(1)(i)-(v)**

Along with the Parties' Joint Statement of Stipulated Facts, Disputed Facts, and Key Legal Issues, AT&T Corp. ("AT&T") and Iowa Network Services, Inc. d/b/a Aureon Network Services, Inc. ("Aureon") (collectively, the "Parties") hereby provide the following Joint Statement on Settlement, Discovery and Scheduling in accordance with the Federal Communication Commission's (the "Commission") June 13, 2017 Notice of Formal Complaint (the "Notice") and Sections 1.733(b)(1)(i)-(v) of the Commission's rules, 47 C.F.R. § 1.733(b)(i)-(v). Counsel for the Parties have held several telephonic meet and confer conferences regarding discovery and the other matters set forth in this Joint Statement. In addition, they have exchanged comments on drafts of this Joint Statement.

**I. SETTLEMENT PROSPECTS**

**A. AT&T's Statement on Settlement**

As AT&T indicated in its required certifications in its Complaint, the Parties have been far apart with respect to settlement and, as a result, AT&T has been reluctant to engage in mediation. *See* Complaint ¶ 23. That position has not changed, and the Parties remain far apart, as evidenced by the Parties' recent negotiations, as well as the very different positions the Parties have taken in their respective filings.

Although Aureon has indicated that it is willing to participate in a Staff-supervised mediation, given the Parties' current positions on settlement, AT&T does not believe that a Staff-supervised mediation at this time would be productive for either the Parties or the Staff. As indicated above, AT&T will, however, have a client representative present at the status conference, and that representative is willing to engage in business-to-business discussions with Aureon's client representative.

If, prior to the time briefing in this proceeding is due to conclude on August 28, 2017, the circumstances change so that in AT&T's view a Staff-supervised mediation might be productive in facilitating a settlement, it will immediately notify both Aureon and the Staff.

**B. Aureon's Statement on Settlement**

Although the parties' positions appear to be far apart, Aureon believes that settlement of this case is still possible. Accordingly, Aureon states that it is willing to engage in staff-assisted settlement discussions, and will have an Aureon corporate officer with settlement authority present at the July 21, 2017 status conference.

## II. ISSUES IN DISPUTE

### A. AT&T's Issues in Dispute

From AT&T's perspective the principal issues in dispute are set forth in Counts I and II of its Formal Complaint and discussed in AT&T's Legal Analyses in Support of its Formal Complaint.

As to Count I, AT&T is asking the Commission to find that Aureon has violated Section 201(b) of the Act, 47 U.S.C. § 201(b), by (i) billing AT&T tariffed CEA rates in violation of the terms of its tariff (AT&T Legal Analysis & Reply Legal Analysis, Part I); (ii) charging AT&T excessive rates for terminating its long distance traffic (*see id.*); (iii) entering into anticompetitive traffic agreements with access stimulating CLECs (*see id.*); (iv) filing tariffs with access rates that violate the Commission's rate cap and rate parity regulations, and billing AT&T pursuant to such tariffs (*see id.* Part II); (v) violating the Commission's access stimulation rules by failing to file a revised tariff with rates that match the rates of CenturyLink, the lowest price cap LEC in Iowa (*see id.* Part III); and (vi) manipulating its CEA rates to the detriment of AT&T and other IXC's (*see id.* Part IV).

As to Count II, AT&T is asking the Commission to find that Aureon has violated Sections 203(a) and 203(c) of the Act, 47 U.S.C. §§ 203(a) and 203(c), by billing AT&T pursuant to unlawful and invalid tariffs in the following respects: (i) charging AT&T for CEA service in violation of the terms of its tariff and without obtaining appropriate authorization to impose its tariffed CEA rates on access stimulation traffic (*see AT&T Legal Analysis & Reply Legal Analysis, Part I*); (ii) having tariffs with access rates that violate the Commission's rate caps and rate parity regulations (*see id.* Part II); and (iii) failing to revise its tariffs pursuant to the Commission's access stimulation rules (*see id.* Part III).

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As to both Counts, AT&T further asks the Commission to find that (i) AT&T is not liable for the CEA rates that Aureon has billed AT&T on access stimulation traffic; and (ii) Aureon must refund amounts it improperly billed to AT&T, and which AT&T paid, in amounts to be determined in a subsequent proceeding. AT&T also asks that the Commission conduct, in a subsequent proceeding, a detailed review of Aureon's CEA rates in order to determine (i) a reasonable rate on a going forward basis; and (ii) whether Aureon engaged in "furtive concealment" of violations of the Commission's rules by using improper accounting methods, thus allowing access customers to pursue refunds. *See ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 413 (D.C. Cir. 2002)

Finally, Aureon's affirmative defenses are without merit. First, AT&T's Complaint alleges facts that, if true, establish that Aureon violated the Communications Act. Second, Aureon does not and cannot dispute that AT&T has alleged sufficient facts within the statute of limitations that Aureon has violated Sections 201 and 203. Third, the Commission's 1988 Section 214 proceeding—an administrative proceeding nearly 30 years ago—does not in any way bar AT&T's claims under res judicata or collateral estoppel. And to claim otherwise is nonsense, as the facts today are *much* different and have never been considered by the Commission; moreover, none of AT&T's claims is identical to any issue litigated in that prior proceeding. Fourth, the Commission's regulations, and its accompanying explanation in the *Connect America Order*, provide Aureon with ample and clear notice that Aureon – as a LEC providing switched access services – was subject to the rate caps. Fifth, Aureon's "contrary to public policy" defense is meritless, as there is no "mandatory use" requirement, certainly as to access stimulation traffic that Aureon transports to CLECs. And sixth, because AT&T has elected to bifurcate its damages claim, Aureon's "failure to mitigate" defense is premature and should be deferred until any supplemental complaint for damages.



**B. Aureon's Issues in Dispute**

Aureon's position is that the issues in dispute are set forth in its Answer, and discussed in Aureon's Legal Analysis in Support of its Answer.

When the FCC granted Section 214 authorization to Aureon to build a fiber optic network to provide CEA service, and to bring advanced functionalities, and modern information services to rural areas in Iowa, the Commission recognized that CEA service would not be viable unless the major IXCs, such as AT&T, were required to send all of their traffic to local exchange carriers ("LECs") connected to the CEA network over the CEA network. Accordingly, the FCC and the Iowa Utilities Board ("IUB") imposed a mandatory use policy that required all IXCs, including AT&T, to route such traffic over Aureon's CEA network, and the IUB required the policy to be enforced through traffic agreements between Aureon and the subtending LECs. The Commission expressly applied the CEA mandatory use policy to all forms of terminating traffic, including conference calls, in order to provide the terminating traffic concentration necessary to foster competition with AT&T for terminating calls to rural Iowa and ensure that the CEA tariff rate remains affordable for AT&T's smaller competitors. Aureon requests that the Commission find that the CEA mandatory use policy requires AT&T to route all of its traffic over the CEA network to the subtending LECs, and that Section 69.112(i) expressly exempts CEA providers and the subtending LECs from the requirement to provide direct-trunked transport to AT&T.

Aureon is not an ILEC, and it is not a CLEC. It is a dominant provider of CEA service. With regard to Aureon's CEA tariff and the CEA tariff rate, Aureon has, since its inception, filed its CEA tariff rates pursuant to traffic and cost studies required by Section 61.38 applicable to dominant carriers. The FCC's 2011 *Connect America Fund Order* only capped rates for nondominant ILECs and CLECs. Aureon requests that the Commission find that Aureon's rates

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were not capped by the 2011 *Connect America Fund Order*, and that Aureon properly calculated its rates in accordance with Section 61.38.

Aureon is not engaged in access stimulation because it is not a party to an access revenue sharing agreement. Aureon does not know whether subtending LECs are engaged in access stimulation because it is not privy to revenue sharing agreements that the subtending LECs have, if any, with other entities. The traffic agreements are not access revenue sharing agreements, but agreements that the IUB required Aureon to obtain in order to effectuate a LEC's participation in the CEA network. Aureon does not have any control over the traffic IXCs send over the CEA network for routing to subtending LECs; however, Aureon has identified suspected conference bridge traffic based on spikes in traffic volumes. Section 251(a) of the Communications Act did not allow Aureon to refuse any LEC's request to interconnect with the CEA network, and the Commission has determined that it would constitute an unreasonable practice in violation of Section 201 of the Communications Act if Aureon blocked traffic directed to a LEC that Aureon suspects is engaged in access stimulation. Aureon has provided CEA service, as defined in its CEA tariffs, to AT&T for all traffic that AT&T has routed to the CEA network. Aureon requests that the Commission find that Aureon is not engaged in access stimulation, that Aureon provided CEA service to AT&T for all traffic billed to AT&T, and that AT&T must pay the CEA tariff rate for that traffic.

Section 204(a)(3) of the Communication Act, 47 U.S.C. § 204(a)(3), provides that carriers may file rates with the FCC contained in tariffs, and those rates are "deemed lawful" unless the Commission takes action before the end of the appropriate notice period. The FCC has not taken any actions before the end of the appropriate notice period against Aureon's tariff rates that are the subject of this proceeding, and AT&T has not filed a petition at the FCC against Aureon's tariff

filings. Aureon requests that the Commission find that Aureon's tariffs applicable to this proceeding are "deemed lawful," that AT&T is required to pay the deemed lawful CEA rate as set forth in those tariffs, and that AT&T is required to pay interest and attorneys' fees as set forth in those tariffs. Aureon further requests that the FCC determine that Aureon developed its traffic and cost support for its tariff rates in accordance with Section 61.38 and Parts 32, 36, 64, and 69 of the FCC's rules as they apply to dominant carriers.

Finally, the FCC's *Fifth Report and Order* in the Competitive Common Carrier Services proceeding<sup>1</sup> prohibited Aureon's Access Division from jointly owning the transmission and switching facilities with Aureon's IXC Division.<sup>2</sup> Aureon's division of its CEA and interexchange services between the Access and IXC Divisions, respectively, was approved by the Commission at the time it granted Aureon's Section 214 authorization in 1989. All of Aureon's costs are separated into appropriate regulated and non-regulated accounts, and Aureon has used independent third-party consultants to prepare Aureon's cost studies to ensure that its tariff review plan ("TRP") filings are accurate, and comply with the Commission's accounting rules. The lease rate that the IXC Division has charged the Access Division was established consistent with Sections 32.27(c) and 64.902 of the Commission's rules. First, Aureon determined the lease rate that would recover the fully distributed costs for the facilities that the IXC Division leases to Access Division. Then, Aureon's management selected a lease rate below the rate needed to recover those fully distributed costs. Aureon's cost allocations are appropriate, and its inclusion of uncollectible revenues is

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<sup>1</sup> Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fifth Report and Order, 98 F.C.C.2d 1191 (1984) ("*Fifth Report and Order*").

<sup>2</sup> Aureon's IXC Division is referred to interchangeably as the "IXC Division" or the "Network Division." The Parties have attempted to maintain consistency in this filing by only referring to the IXC Division.

appropriate under the FCC's rules, and applicable accounting rules. Aureon requests that the Commission find that Aureon's CEA rates are just and reasonable, that its cost and accounting allocations and methodologies are appropriate, and that Aureon's tariff filings contained the required cost support materials to justify Aureon's CEA rates.

### **III. DISCOVERY**

During the Parties' meet and confer process, counsel for the Parties discussed each of the Interrogatories, as well as the potential need for depositions. The Parties' position regarding the status of the interrogatories, as well as need for the depositions, is set forth below.

#### **A. AT&T's First and Second Sets of Interrogatories to Aureon**

In its Objections and Responses to AT&T's Interrogatories, dated June 28, 2017 and July 10, 2017, Aureon has agreed to produce certain information in response to AT&T Interrogatory Nos. 2, 3, 5, 6, 10, 11, 12, and 13. Further, in connection with the meet and confer process, Aureon has agreed to produce additional material in response to AT&T-Interrogatory Nos. 1 (information regarding the LECs suspected of being involved with call aggregation traffic, and the volume of call aggregation traffic routed to each identified LEC); 2 (information regarding the development of the proposed rate for High Volume Contract Tariff No. 1 and volume discount plan (\$0.00649 per minute) and the fully distributed cost (\$0.00604 per minute)); 7 (information regarding the methodology for calculating the lease rate charged by the IXC Division to the Access Division); 10 (information regard the DS-3 circuits Aureon has with the seven LECs identified by AT&T in its November 8, 2016 informal document request); and 11 (for each of the seventeen IXCs identified in Aureon's response, the total minutes of use by month and by carrier of all traffic that Aureon transported between September 2013 and May 2017).

Consequently, the only open issue regarding AT&T's Interrogatories to Aureon that needs to be resolved by Commission Staff at this juncture<sup>3</sup> relates to **AT&T-Interrogatory No. 15**, wherein AT&T requested that Aureon state whether its IXC Division leases transport capacity to third parties, and if so to identify the services and state whether the rates for any of those services is based on fully distributed costs as that term is used in the Declaration of Jeff Schill.

**Aureon's Position** -- In both its Response and Objection and during the meet and confer process Aureon has taken the position that the request is both irrelevant (because limited point-to-point transport service is not comparable to the lease of capacity to the Access Division, which provides access to Aureon's entire fiber network) and burdensome (there are hundreds, if not thousands, of transport capacity leases to third parties).

**AT&T's Position** -- As to relevancy, it is AT&T's position that this information is relevant to assessing the reasonableness of the lease rates that the IXC Division charges to the Access Division, particularly as it relates to the transport of access stimulation traffic. In addition, this information is relevant to issues pertaining to the bypass of Aureon's CEA service, particularly whether the availability and rates for such capacity have facilitated such bypass. With respect to burden, AT&T is willing to narrow its request to the rates for Aureon services relating to the transport of traffic to one of the seven LECs identified by AT&T in its November 8, 2016 informal discovery request.

**B. Aureon's Interrogatories to AT&T**

In its Response to Aureon's Interrogatories, dated July 5, 2017, AT&T has agreed to certain information in response to Aureon-Interrogatories Nos. 4, 5, 8 and 9. In addition, AT&T has

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<sup>3</sup> Both AT&T and Aureon reserve their respective rights to bring additional discovery matters to the Commission Staff's attention if a Party fails to produce information that it has agreed to produce.

indicated its willingness to discuss the mutual exchange of information regarding documents withheld as privileged. *See* AT&T's Response to Aureon Interrogatory No. 10. As to Aureon-Interrogatory Nos. 1, 2, 3, 6 and 7, AT&T has objected to the production of the requested material for the reasons stated in its July 5 Response. *See* AT&T's Response to Aureon-Interrogatory Nos. 1, 2, 3, 6 and 7. AT&T has also objected to certain aspects of Aureon's Interrogatory Nos. 5 and 9, again for the reasons stated in its Response. *See id.* Aureon-Interrogatory Nos. 5 and 9.

During the meet and confer process, Aureon indicated that it intended to press its requests for the information to which AT&T has objected and also has sought to expand the scope of Aureon-Interrogatory No. 1 to encompass 2011, 2012 and all of 2013. Consequently, aspects of **Aureon-Interrogatory Nos. 1, 2, 3, 5, 6, 7, 9 and 10** need to be resolved by Commission Staff at this juncture.<sup>4</sup> Each of those Interrogatories is discussed below.

**Aureon Int. No. 1:** Aureon requested that AT&T provide wholesale agreements that it has with other service providers pursuant to which AT&T has routed traffic for those providers to Aureon's network between August 2013 and the present, and information regarding, among other things the rates charged, amounts billed, minutes-of-use, and amounts AT&T paid to Aureon for that traffic.

**Aureon's Position --** This information is directly relevant to support Aureon's affirmative defense of "claimant's own conduct" to demonstrate that AT&T significantly increased the volume of traffic for which AT&T was billed by Aureon through a scheme whereby AT&T received payments from other carriers to transport the traffic of those other carriers to Aureon's network,

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<sup>4</sup> As previously noted, both Aureon and AT&T reserve their respective rights to bring additional discovery matters to the Commission Staff's attention if a Party fails to produce information that it has agreed to produce.

and then AT&T deliberately deprived Aureon of any compensation for such usage of Aureon's network. In its Reply, AT&T for the first time disclosed that **[[BEGIN HIGHLY CONFIDENTIAL]]** [REDACTED] **[[END HIGHLY CONFIDENTIAL]]** of the traffic that AT&T routed over the CEA network in 2014 was wholesale traffic that AT&T transported for other IXC's. Aureon only recently learned that the vast majority of the access stimulation traffic has not been routed over the CEA network. AT&T's formal complaint accuses Aureon of aiding the increase in access stimulation traffic, and points to the year 2011 when the traffic volume on the CEA network reached its peak. Aureon requests that the Commission extend the scope of the information requested in this interrogatory to the years 2011, 2012, and all of 2013. By offering other IXC's a rate that was lower than the CEA tariff rate to route access stimulation traffic to the CEA network, Aureon suspects that AT&T increased the volume of traffic on the CEA network in 2011 by adding access stimulation traffic that previously had been sent to CEA subtending LECs over transport providers that bypassed the CEA network. Consequently, the requested information will show whether the increase in traffic on the CEA network in 2011-2013 was caused by AT&T, and not by Aureon. Furthermore, the requested information will show whether AT&T engaged in unlawful traffic dumping because AT&T could not profit from charging a rate to other IXC's that was less than the CEA tariff rate unless AT&T intended to increase the traffic on the CEA network but never compensate Aureon.

This information is also needed to support the affirmative defenses of "conduct contrary to public policy," "res judicata," and "collateral estoppel." Copies of AT&T's wholesale termination agreements and information regarding AT&T's wholesale rates will show whether the price that AT&T charges other carriers is significantly less than the tariff rate that AT&T knows it has to pay Aureon when AT&T routes the traffic of other carriers to Aureon's network.

**AT&T's Position** – As AT&T explained in its July 5 Response, this request does not seek information that is relevant to the matters properly at issue in the liability phase of this proceeding, nor is it proportionate. *See* AT&T's Response to Aureon-Interrogatory No. 1. Even if Aureon's wildly speculative claims had any basis in fact (and as explained below, they do not), such claims and "facts" would not aid the Commission in deciding any of AT&T's liability claims or any of Aureon's liability defenses. While AT&T vigorously disputes the notion that it "caused" the increase in Aureon's access stimulation traffic,<sup>5</sup> even if that were true, that "fact" has no bearing on any of AT&T's claims or Aureon's defenses. Such "facts" have nothing to do with the scope of Aureon's CEA tariff, or the rate cap/rate parity claim. As to AT&T's access stimulation claim, a LEC has no valid defense that its engagement in access stimulation was "caused" by an IXC (and in fact, INS is a primary cause, because it elected to sign traffic agreements with access stimulation CLECs in order to bill more access charges). Nor are these facts relevant to INS's defenses. INS's "public policy" defense did not mention any of these claims, or assert the relevance of any information about AT&T's wholesale offers. INS Answer at 99–102. The same is true of INS's collateral estoppel and res judicata defenses, which contain no mention of these facts and claims. *See id.* at 91–97.

In any event, AT&T has not engaged in, and Aureon has not presented any evidence of "traffic dumping," as Aureon alleges. To the contrary, the evidence presented in the Declaration of Daniel P. Rhinehart shows exactly the opposite. **[[BEGIN HIGHLY CONFIDENTIAL]]**

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<sup>5</sup> AT&T and other IXCs have vigorously opposed access stimulation for over a decade, and AT&T remains of the view that it is an arbitrage scheme that harms consumers. The parties that caused the increases (and continuation) of access stimulation are the LECs engaged in the practice (like Great Lakes and INS) and the conference and chat providers, not AT&T.



[END HIGHLY

**CONFIDENTIAL]]** See AT&T Exhibit 83. Further, the scheme that Aureon hypothesizes does not make economic sense, particularly for periods prior to August 2013 during which AT&T was paying Aureon's CEA rate in full. Likewise, Aureon's assertion that "the vast majority of access stimulation traffic has not been routed over the CEA network" – even if true – has nothing to do with AT&T and the routing of its wholesale traffic. To the extent that bypass is occurring at the levels alleged by Aureon, that bypass is the result of the conduct of others and Aureon's apparent lack of vigilance, not anything done by AT&T. Finally, this request is unduly burdensome for the reasons identified in AT&T's July 5 Response. See AT&T's Response to Aureon-Interrogatory No. 1.

**Aureon Int. No. 2:** Aureon requested that AT&T provide information regarding its involvement with bypass or its plans to circumvent Aureon's CEA network.

**Aureon's Position** -- This information is needed to support Aureon's affirmative defenses of "conduct contrary to public policy," "res judicata," and "collateral estoppel." The requested information will also test the credibility of AT&T's assertion that there is no CEA mandatory use policy, because if there were no such policy, AT&T would have sent traffic over direct trunked transport by now. Furthermore, evidence uncovered through informal discovery shows that a large volume of traffic is bypassing Aureon's CEA network in violation of the FCC's mandatory use policy. If the evidence sought through this discovery request shows that AT&T has allowed, or is taking steps to allow, the traffic of AT&T's customers to be transported to the subtending LECs' end offices without routing such traffic to Aureon's network, then such unlawful conduct by AT&T is relevant to the Commission's consideration of the reasonableness of the CEA tariff rate.

The amount of traffic that AT&T plans to remove from the CEA network will determine the increase in the CEA tariff rate that will have to be paid by AT&T's competitors.

**AT&T's Position** -- As AT&T explained in its July 5 Response, it has already searched for and produced documents responsive to the matters addressed by this Interrogatory, certain of which were cited by Aureon in its answering submission. As those documents establish, AT&T has no agreements in place pursuant to which it is bypassing Aureon's network and Aureon cites no evidence that AT&T is, in fact, bypassing Aureon's network. Consequently, it is not AT&T's conduct that accounts for the "large volume of traffic ... [allegedly] bypassing Aureon's CEA network in violation of the FCC's mandatory use policy." Further, AT&T's conduct is in no way relevant to the question of whether the Commission has adopted a mandatory use policy with respect to access stimulation traffic routed on Aureon's network. As AT&T has previously explained, no such policy exists. *See* AT&T Legal Analysis, Part I.C.4; AT&T Reply Legal Analysis, Part I.B.5. Finally, there is no merit to Aureon's various affirmative defenses that seek to justify Aureon's failure to comply with its obligations under the Act, the Commission's rules and regulations, and Aureon's own tariffs, by blaming AT&T. *See* AT&T's Reply to Aureon's Answer at 75–82.

**Aureon Int. No. 3:** Aureon requested that AT&T provide information regarding AT&T's routing or plans to route traffic that does not involve access stimulation (from) or to the facilities of one or more Subtending LECs without routing such traffic to Aureon's network.

**Aureon's Position** -- This information is needed to support Aureon's affirmative defenses of "conduct contrary to public policy," "res judicata," and "collateral estoppel." The amount of traffic that AT&T plans to remove from the CEA network will determine the increase in the CEA tariff rate that will have to be paid by AT&T's competitors. Furthermore, evidence uncovered

through informal discovery shows that a large volume of traffic is bypassing Aureon's CEA network in violation of the FCC's mandatory use policy. If the evidence sought through this discovery request shows that AT&T has allowed, or is taking steps to allow, the traffic of AT&T's customers to be transported to the Subtending LECs' end offices without routing such traffic to Aureon's network, then such unlawful conduct by AT&T is relevant to the Commission's consideration of the reasonableness of the CEA tariff rate. While AT&T's formal complaint has alleged that the CEA tariff rate is unreasonable, the requested information will show whether AT&T has plans to remove a large volume of traffic from the CEA network that will require an even higher CEA tariff rate for AT&T's competitors.

**AT&T's Position** -- As previously noted in response to Aureon Interrogatory No. 2, AT&T does not have any agreements in place to route traffic from or to the facilities of Subtending LECs without routing such traffic over Aureon's network. Further, Aureon has not cited any evidence that AT&T has in fact bypassed Aureon's network. Instead, it seeks to justify this Interrogatory (which is focused on non-access stimulation traffic) by speculating as to what AT&T might consider doing at some time in the next five years. That is not an adequate justification to require AT&T to expend additional resources searching for and producing documents regarding future plans relating to the handling of non-access stimulation traffic, which is not a major focus of the matters properly at issue in this proceeding. The focus of this proceeding is on whether access stimulation traffic is encompassed by Aureon's CEA tariff, whether Aureon violated the Commission's rate cap, rate parity and access stimulation rules, or whether Aureon manipulated its rates. The requested discovery relating to non-access stimulation traffic has no bearing on the Commission's resolution of those issues.

**Aureon Int. No. 5:** Aureon requested that AT&T provide information regarding the reduction in Aureon's revenue requirement and interstate rate of return for CEA service between August 2013 to the present calculated in accordance with 47 C.F.R. § 61.38 for three different traffic scenarios.

**Aureon's Position** – Aureon has not modified this request. The original "Explanation" discussed the letters that AT&T sent to subtending LECs seeking to remove AT&T's traffic from the CEA network. Only AT&T knows the traffic volumes AT&T plans to remove from the CEA network as a consequence of its letter writing campaign and the increase in the CEA rate under Section 61.38 that will result for AT&T's competitors. Aureon is unable to make the calculations because Aureon does not know the traffic volumes that AT&T plans to remove from the CEA network, and what assumptions AT&T used to determine whether Aureon's rates are reasonable. This information is also needed to support Aureon's affirmative defenses of "conduct contrary to public policy," "res judicata," and "collateral estoppel."

**AT&T's Position** -- None of the "three different traffic scenarios" set forth in Aureon-Interrogatory No. 5 focus on the "traffic volumes AT&T plans to remove from the CEA network," but rather they relate to AT&T's actual traffic volumes – information that Aureon does possess. Further, this Interrogatory requests AT&T to identify the "reduction in Aureon's revenue requirement and interstate rate of return for CEA service" that would result for a past period (i.e., August 2013 to the present), which has nothing to do with volumes that might be removed in the future. Moreover, as discussed in response to Aureon-Interrogatory No. 6, AT&T does not have sufficient data regarding, among other things, the lease costs charged to the Access Division to make such a calculation. By contrast, Aureon does have access to such information and could have made such calculations based on the three traffic scenarios identified in the Interrogatory. As

AT&T pointed out in its July 5 Response, Aureon did not include such an analysis in its answering submission which calls into question its relevance. *See* AT&T's Response to Aureon-Interrogatory No. 5. Additionally, AT&T should not be put to the burden of doing calculations that Aureon could have done but elected not to do.

**Aureon Int. No. 6:** Aureon requested that AT&T provide information regarding AT&T's determinations that Aureon misapplied Section 61.38 in calculating the CEA tariff rate, that Aureon's cost studies and other related materials are incorrect, and that Aureon used improper accounting methods or engaged in rate manipulation.

**Aureon's Position** -- This information is needed to determine the methodology used and basis for AT&T's conclusion that Aureon's tariff rate is unreasonable, and that its TRPs and cost studies are flawed in order to rebut AT&T's assertion that Aureon's calculated revenue requirement, rate of return, and tariff rate are inaccurate. Only AT&T knows what CEA tariff rate AT&T will calculate when applying Section 61.38. Aureon's rate and cost support filed with its tariff filings provides AT&T with sufficient information, including the lease costs in the Access Division's revenue requirement, to perform such a calculation. Aureon needs to review the details of AT&T's analysis and the reasoning behind its conclusions to determine if AT&T is applying the FCC's rules correctly with regard to Aureon's cost studies as Aureon has always performed its cost studies in accordance with Section 61.38 and Parts 32, 36, and 69 of the FCC's rules.

**AT&T's Position** -- As AT&T explained in its July 5 Response, the basis for AT&T's concerns as to the reasonableness of Aureon's CEA rate are fully set forth in the two declarations that Mr. Rhinehart submitted and in AT&T's Complaint, its Legal Analysis and its Reply Legal Analysis. *See* AT&T's Response to Aureon-Interrogatory No. 6. Consequently, Aureon already has access to "the basis for AT&T's conclusions that Aureon's tariff rate is unreasonable." As

AT&T further explained, Aureon has not provided sufficient information, particularly regarding the leases costs charged to the Access Division, to enable AT&T to re-compute a CEA rate. *Id.* Finally, the matters addressed by this Interrogatory are more appropriately addressed during the damages phase of this proceeding.

**Aureon Int. No. 7:** Aureon requested that AT&T provide information regarding AT&T's agreements to pay subtending LECs for access stimulation traffic that AT&T routes over the CEA network.

**Aureon's Position** -- The requested information will demonstrate that it is unreasonable for AT&T to pay Aureon zero when AT&T pays Subtending LECs for access stimulation traffic. Payments by AT&T for access stimulation traffic pursuant to agreements that AT&T voluntarily negotiated will also show that access stimulation traffic is compensable traffic subject to access charges, including Aureon's CEA tariff rate. Any failure by AT&T to fully pay the tariff rate for the switching and transport of such traffic causes cost under-recovery and requires increases to Aureon's CEA tariff rate. Aureon is willing to narrow its request to information related to subtending LECs that have been engaged in access stimulation or suspected by AT&T of doing so.

**AT&T's Position** – As AT&T pointed out in its Response to this Interrogatory, as originally written, it would have required AT&T to produce all documents relating to its dealings with respect to every Subtending LEC on Aureon's network and was thus extremely burdensome. *See* AT&T's Response to Aureon-Interrogatory No. 7. In an apparent effort to address that concern, Aureon has now indicated its willingness "to narrow its request to information related to subtending LECs that have been engaged in access stimulation or suspected by AT&T of doing so." While that modification might decrease the burden somewhat, it does nothing to address

AT&T's relevancy objection. The amounts that AT&T pays to Aureon's Subtending LECs for a different switched access service has no relevance, nor is it a defense, to Aureon's unlawful conduct. Whether access stimulation traffic is encompassed within Aureon's CEA tariff, whether Aureon violated the Commission's rate cap, rate parity and access stimulation rules, or whether Aureon manipulated its rates are not issues that relate to, or are dependent on, the amounts that AT&T pays to Aureon's Subtending LECs that are engaged in access stimulation.

**Aureon Int. No. 9:** Aureon requested that AT&T provide detailed information regarding the categories of traffic routed to Aureon's network, rates, MOUs, and incremental revenues AT&T received. AT&T has agreed to provide traffic data, but has refused to provide any rate or revenue information.

**Aureon's Position** -- The requested information may be used to demonstrate that Aureon's rates are just and reasonable. Aureon's CEA tariff rate is a necessary cost that AT&T will incur when AT&T transports calls for customers that are routed over Aureon's CEA network. Therefore, the price that AT&T charges its customers or, if not a per-minute rate, the revenue that AT&T receives from its customers, may help demonstrate the reasonableness of Aureon's tariff rate, if AT&T priced its service rationally. To the extent AT&T charges a price for routing calls to Aureon's network that is higher than Aureon's tariff rate, a larger margin above Aureon's tariff rate will help demonstrate that the market price is above Aureon's tariff rate and that Aureon's tariff rate is reasonable. The greater the amount that AT&T's price exceeds Aureon's tariff rate, the higher the price that the market has determined to be reasonable during the voluntary contractual negotiations between AT&T and its customers. The information is also needed to demonstrate that Aureon's CEA service does provide value to AT&T because Aureon's service enables AT&T to bill its customers for calls made to rural Iowa, and that AT&T failed to mitigate

its damages. The requested information will also help determine whether AT&T did not challenge the lawfulness of the CEA tariff rate because AT&T's intent was to engage in unlawful traffic dumping and to not pay the tariff rate regardless of that rate being lawful.

**AT&T's Position --** As previously explained, AT&T will provide the requested traffic data, but the rates that AT&T's customers pay and the revenues that AT&T collects for its long distance services have nothing to do with whether access stimulation traffic is encompassed within Aureon's CEA tariff, whether Aureon violated the Commission's rate cap, rate parity and access stimulation rules, or whether Aureon manipulated its rates. *See* AT&T's Response to Aureon-Interrogatory No. 9. Contrary to Aureon's claim, Aureon's CEA rate is not a "necessary cost," particularly with respect to access stimulation traffic. Further, under the ratemaking regime applicable to Aureon's CEA rates, neither the prices AT&T's customers pay nor AT&T's margins are factors in determining whether Aureon's rates are just and reasonable.<sup>6</sup> Rather, that inquiry is driven primarily by an analysis of the reasonableness of the Access Division's revenue requirements and its traffic forecasts. Likewise, there is no merit to Aureon's allegations of "traffic dumping" or its other so-called affirmative defenses. *See supra*, AT&T's response to Aureon-Interrogatory Nos. 1 and 2. Additionally, production of the requested rate and revenue information would be extremely burdensome and the request is therefore not proportionate. Finally, AT&T notes that this type of data, to the extent it has any relevancy at all, is more properly considered in the damages phase of this proceeding

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<sup>6</sup> Further, while Aureon's rate is unreasonably high, as the Commission has recognized, there are regulatory limitations on AT&T's ability to pass on the costs associated with Aureon's high rates to the originating callers. *See CLEC Access Charge Reform*, 16 FCC Rcd. 9923, ¶ 30 (2001).



**Aureon Int. No. 10:** Aureon requested that AT&T provide a detailed privilege log for all documents in this proceeding.

**Aureon's Position** -- AT&T has agreed to provide a limited privilege log, but it is unclear if AT&T will provide the detailed information Aureon has requested. Without that detailed information, such as the identities and roles of each author and recipient, there is no way for Aureon to determine whether the information that AT&T has redacted or withheld falls within the scope of any privilege.

**AT&T's Position** -- Aureon has not accurately summarized AT&T's position. AT&T did not agree to provide a "limited privilege log." Instead, it noted its specific concerns as to Aureon's Interrogatory and stated that it is "prepared to discuss with INS and Commission Staff alternative approaches that will ensure that all relevant non-privileged material is produced but at the same time reduce to the maximum extent possible the significant burdens associated with the review of privileged material." *See* AT&T's Response to Aureon-Interrogatory No. 10. AT&T further stated its position that "the logging of privileged documents must be done on a uniform, mutual basis." *Id.* That continues to be AT&T's position.

### **C. The Need for Depositions**

The Parties have discussed the issue of depositions. Aureon does not believe that depositions are needed and therefore opposes the taking of any depositions. As it relates to most issues, AT&T agrees. However, AT&T believes that a deposition is needed regarding the certain issues pertaining to Aureon's rate calculations.

**AT&T's Position** -- As detailed in the Reply Declaration of Daniel P. Rhinehart, there are a number of open issues regarding Aureon's computation of its rates, particularly as it relates to the network costs included in the Access Division's revenue requirement. Those issues include the calculation of the lease costs allocated to the Access Division, the sources underlying and the

significance of Table 1 to the Schill Declaration, and the type of testing done by Aureon regarding the reasonableness of the leases costs allocated to the Access Division. In addition, there are open issues regarding whether Aureon's network and services are being used to bypass Aureon's CEA service and Aureon's knowledge of such bypass. While some of these issues may be resolved by the additional discovery that Aureon has agreed to make available, it is doubtful that all such questions will be so resolved. Further, the explanation that Aureon sets forth below as to the alleged significance of Table 1 and the purported manner in which Aureon's management "selected a lease rate for the Access Division's CEA revenue requirement" is not a substitute for evidence, does not explain the sources underlying and methodology used in developing Table I and does not address how the "selected" lease rates compared to the rates for other comparable transport alternatives. Likewise, the fact that Mr. Schill may not know anything about the bypass that is occurring with respect to Aureon's CEA service does not answer the question of whether Aureon's network or services are being used to bypass Aureon's CEA service, or what efforts Aureon has made to investigate such bypass or to enforce what it contends is the mandatory use obligation. Accordingly, AT&T requests that Mr. Schill, or an Aureon representative with knowledge of these issues, be made available for a deposition to address these matters.

**Aureon's Position --** Aureon believes that depositions would be unduly burdensome and unnecessary because Aureon has agreed to provide the majority of the information requested by AT&T during discovery. Table 1 to the Schill Declaration identified the lease rates that Aureon's IXC Division would need to charge in order to recover the fully distributed costs for the facilities that are leased to the Access Division. Aureon's management then selected a lease rate for the Access Division's CEA revenue requirement that was less than the rate required to recover the IXC Division's fully distributed costs. While there are no additional calculations for that lease

rate, Aureon will provide AT&T with the lease rate that was selected for several years. The detailed cost support provided with Aureon's tariff filings provide ample information explaining how the CEA tariff rate was calculated. As Aureon stated in its Answer and supporting sworn declarations, Aureon only recently learned that traffic to CEA subtending LECs was being transported by third parties without routing that traffic over the CEA network. Mr. Schill will not have information to add that has not already been provided AT&T. To the extent that AT&T is permitted to take depositions, Aureon requests that it be permitted to depose AT&T witnesses that have knowledge of AT&T's traffic dumping on the CEA network and AT&T's decision to not use direct trunked transport in lieu of the CEA network.

#### **IV. SCHEDULE FOR PLEADINGS AND DISCOVERY**

At the meet and confer, the Parties discussed the dates to be proposed for the cut-off of discovery and the filing of final briefs and agreed to the following schedule: (a) all discovery be completed by August 16, 2017; (b) simultaneous final briefs of no more than 25 pages be filed by August 21, 2017; and (c) simultaneous final reply briefs of no more than 10 pages be filed by August 28, 2017. Exhibits and other materials submitted in support of the briefs are excluded from the page count consistent with Section 1.48 of the Commission's rules.

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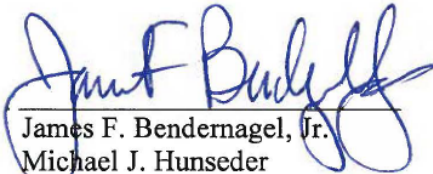
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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2017, I caused a copy of the foregoing Joint Statement on Settlement, Discovery and Scheduling to be served as indicated below to the following:

Marlene H. Dortch  
Office of the Secretary  
Market Disputes and Resolution Division  
Federal Communications Commission  
445 12<sup>th</sup> Street SW  
Washington, DC 20554  
(Original of the Confidential Version, the  
Highly Confidential Version, and the  
Third Party Highly Confidential Version  
via Hand Delivery)

Lisa Griffin  
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Sandra Gray-Fields  
Christopher Killion  
Enforcement Bureau  
Federal Communications Commission  
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Three courtesy hard copies of the Third Party  
Highly Confidential Version  
via Hand Delivery)

Respectfully submitted,



James F. Bendernagel, Jr.